

**THE VIABILITY OF THE ENFORCEMENT OF MORTGAGE SECURITY IN
NIGERIA**

BY

OLADAPO, OLUWATOYIN OLUBUKOLA

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**BEING A LONG ESSAY IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR
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DECLARATION

I hereby declare that this project is the product of my research efforts undertaken under the supervision of Barr. Deji P. Olanrewaju and has not been presented elsewhere for the award of a degree or certificate. All sources have been clearly stated and appropriately acknowledged.

.....

OLADAPO OLUWATOYIN OLUBUKOLA

CERTIFICATION

This is to certify that the work titled “**THE VIABILITY OF THE ENFORCEMENT OF MORTGAGE SECURITY IN NIGERIA**” was carried out by Oladapo Oluwatoyin Olubukola in the Department of Private and Commercial Law, School of Law and Security Studies, Babcock University, Iperu-Remo, Ogun State.

This project has been read and approved to meet the requirements for the award of LL.B.

.....

BARRISTER OLANREWAJU, P.

SUPERVISOR

.....

DATE

.....

DR. TITILAYO ADERIBIGBE

HEAD OF DEPARTMENT

PRIVATE AND COMMERCIAL LAW

.....

DATE

.....

PROF. BANKOLE SODIPO

DEAN,

SCHOOL OF LAW AND SECURITY STUDIES

BABCOCK UNIVERSITY

.....

DATE

DEDICATION

This work is dedicated to the Almighty God my sufficiency, and the reason for my existence. It is also dedicated to the beautiful family of Mr. and Prof. I.O. Oladapo.

ACKNOWLEDGEMENT

All the Glory belongs to God for the completion of this work. Even in my uncertainties, He remained my source of strength and hope. His constant love has kept me sane through every moment.

The awesome family I am so glad to be a part of; the family of Mr. and Prof. I.O. Oladapo. My number one fans and supporters. They have continuously cheered me through my five years in Babcock cumulating in this project. The immense sacrifices made to ensure that I excel well in my chosen field of study cannot be expressed. Thanks for continuously barging me to work on my project. I pray that you will be greatly rewarded and will not be disappointed. I love you Tobi and Temi (the best siblings a girl could ask for). To Mr. M.A. Adebola (my 'best' uncle) thank you for being the inspiration to study Law. Your interest and input in my academic life will be greatly rewarded in Jesus name. Amen.

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ABSTRACT

The role of the financial sector in the sustenance of various projects has made a great impact in the economy of Nigeria. This support extends to all sectors of the economy. The importance of sustaining the financial sector is evident in the various consequences of a failed financial system on the economy of a nation. Mortgage is a major part of the financial system. There is the need to ensure that the mortgage industry in Nigeria is sturdy at all times as its failure would have a massive negative impact on the economy.

This research sought to establish the practicality and challenges of enforcement of mortgage security in Nigeria. It highlighted the various methods through which mortgage institutions can enforce and realize mortgage security. The suitability of each method for each form of mortgage has been highlighted. The methodology employed in this work was doctrinal. Using primary and secondary sources it was discovered that the challenges inherent in the enforcement and realization of mortgage security in Nigeria range from the challenges in each method of enforcement, social, legal, regulatory, legislative to judicial challenges. The challenges discovered inter alia are: the herculean consent provisions under the Land Use Act, environmental liability of a lender in possession, revocation of right of occupancy without compensation to the mortgagee, protracted judicial proceedings.

This work concluded by proffering recommendations towards the eradication of the challenges to the prompt enforcement of mortgage security in Nigeria. The recommendations include: improved statutory reforms to ameliorate the consent provisions under the Land Use Act, regular environmental impact assessment, the introduction of specialized courts for property matters. The maintenance of a viable mortgage industry and financial sector through adequate enforcement mechanisms is critical to the success of the Nigerian economy.

TABLE OF CONTENTS

TITLE PAGE.....	i
DECLARATION.....	ii
CERTIFICATION.....	iii
DEDICATION	iv
ACKNOWLEDGEMENT	v
ABSTRACT	vii
TABLE OF CASES	xi
TABLE OF STATUTES	xiv
TABLE OF ABBREVIATIONS	xvi
CHAPTER ONE: INTRODUCTION	1
1.1 BACKGROUND TO THE STUDY.....	1
1.2 STATEMENT OF PROBLEM	4
1.3 OBJECTIVE OF THE STUDY.....	5
1.4 RESEARCH QUESTIONS.....	6
1.5 SIGNIFICANCE OF THE STUDY.....	6
1.6 RESEARCH METHODOLOGY.....	7
1.7 SCOPE OF STUDY.....	7
1.8 LIMITATIONS OF STUDY.....	8
1.9 OPERATIONAL DEFINITION OF TERMS.....	8
1.10 SYNOPSIS OF CHAPTERS	9
CHAPTER TWO: LITERATURE REVIEW.....	11
2.1 DEFINITION OF MORTGAGE	11
2.1.1 Mortgage distinguished from other similar transactions	14
2.2 THE CONCEPT OF MORTGAGE SECURITY IN NIGERIA	15
2.2.1 The history of mortgage practice in Nigeria	16
2.3 IMPORTANCE OF SECURITY IN MORTGAGE TRANSACTIONS	16
2.4 LAND AS THE BEST SECURITY FOR A MORTGAGE TRANSACTION ...	19

2.5 MORTGAGE INSTITUTIONS IN NIGERIA	20
2.6 LEGISLATION ON MORTGAGE IN NIGERIA	22
2.7 CLASSIFICATION AND MODES OF CREATION OF MORTGAGE	23
2.7.1 Legal Mortgage	24
2.7.2 Equitable Mortgage	26
2.7.3 Mortgage by operation of law	29
CHAPTER THREE: METHODS OF ENFORCING MORTGAGE SECURITY IN NIGERIA	
3.1 REMEDIES AVAILABLE TO THE MORTGAGEE UNDER THE MORTGAGE TRANSACTION	31
3.1.1 Action to recover mortgage sum and interest	32
3.1.2 Taking possession of the security.....	33
3.1.3 Appointing a receiver	34
3.1.4 Sale of the security	37
3.1.5 Foreclosure.....	41
3.1.6 Action for order of specific performance	43
3.2 REMEDIES AVAILABLE TO A MORTGAGOR UNDER A MORTGAGE TRANSACTION	44
3.2.1 The equity of redemption	44
3.2.2 The equitable right to redeem	46
3.2.3 Injunction against a mortgagee's exercise of power of sale	47
CHAPTER FOUR: ENFORCEMENT OF MORTGAGE SECURITY IN THE NIGERIAN FINANCIAL SYSTEM	
4.0 CHALLENGES TO THE ENFORCEMENT OF MORTGAGE SECURITY IN NIGERIA.....	49
4.1 Challenges posed by the mortgagee's remedies	49
4.2 Legal/Regulatory/Legislative Challenges	52
4.3 Judicial Challenges	55
4.4 Social Challenges	56
4.5 Mortgage and statute of limitation	57
CHAPTER FIVE: SUMMARY, CONCLUSION AND RECOMMENDATIONS	
5.0 SUMMARY	59

5.1 CONCLUSION	60
5.2 RECOMMENDATIONS	61
BIBLIOGRAPHY	
BOOKS	
DICTIONARIES	
JOURNALS AND ARTICLES	
INTERNET SOURCES	

TABLE OF CASES

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TABLE OF ABBREVIATIONS

AMCON – Asset Management Corporation of Nigeria

BOFIA – Banks and other financial Institutions Act

CA – Conveyancing Act

CAMA – Companies and Allied Matters Act

CBN – Central Bank of Nigeria

FHA – Federal Housing Authority

FMBN – Federal Mortgage Bank of Nigeria

LUA – Land Use Act

LWN – Laws of Western Nigeria

NPL – Non-Performing Loan

PCL – Property and Conveyancing Law

PMI – Primary Mortgage Institution

RTL – Registered Titles Law

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND TO THE STUDY

Land constitutes the basis of man's livelihood and existence. This is especially true because the extent of man's development is embedded in the value and measure of land. Inextricably linked with land is the housing sector which is at the core of any developed nation. The impact of the housing sector on the economy of any nation cannot be undermined as it is crucial to any solution proffered to the process of the nation's development. In most developed economies, it is seen as an important sector for stimulating economic growth.¹ It plays a prominent role in both developed and developing economies of the world. In fact it has been acknowledged as one of the guaranteed means for the creation of jobs, eradication of poverty, reduction of corruption and ensuring the security of the nation.² It has also made an impact in terms of ensuring social benefits in the aspect of contributing to community and nation building. As opined by the Minister of Finance in her keynote address³ in India, each new housing unit generates 1.5 direct and 8 indirect jobs and in South Africa, each housing unit creates 5.62 direct jobs and 2.5 indirect jobs. This shows that the housing sector is one which must be assiduously focused on by every nation. Even in Nigeria, housing has been recognized as a major priority but despite 54 years of her independence, much is still left to be desired in the mortgage industry. The housing sector has a significant impact on other sectors of the economy. This is because other sectors of the economy like agriculture,

¹ Okonjo, I., 'Unleashing the Housing Sector in Nigeria and in Africa.' (delivered 28 May 2014 at the 6th Global Housing Finance Conference in World Bank Headquarters, Washington, DC)
<http://www.housingfinanceafrica.org/wp-content/uploads/2014/06/6th_Global_Housing_Finance_CME_Keynote_Speech.pdf> accessed 9 August 2014.

² Omotoso, K., 'Mortgage Banking/Housing Finance Sector in Nigeria: Past. Present. Future.' (presented 3 February 2011 at Nigerian Real Estate 2011: Market Review and Market Projections in Nigeria)
<<http://mban.org.ng/wp-content/uploads/2011/12/Mortgage-Banking-Housing-Finance-Sector-in-Nigeria-Past-Present-Future.pdf>> accessed 18 August 2014.

³ See FN 1.

education, health, finance, technology among others have the use for land and housing in one way or the other.

It is to this extent that the use of real property in the financial sector (which ultimately flows to other sectors of the economy) will be examined in this research. It is well established in any modern economy that the use of credit is essential for business and economic growth.⁴ Sometimes, private individuals and companies do not have the capital to embark on certain projects from time to time. Therefore, there is the need to obtain funds from lending institutions. Collateral is an important factor in credit underwriting.⁵ Real property serves as valuable collateral for loans. Although real property is not the only property that can be used as collateral for loans but about 80% of collaterals in banks is real property. This is because its value generally appreciates over time, it is more stable and reliable and it is easier to enforce judgment in case of default. Thus the mortgage market plays such a vital role in the grand scheme of the ultimate development for the country. A typical mortgage situation involves the transfer of interest in land as security for the discharge of a debt or the performance of an obligation subject to redemption.⁶ It is the practice of giving rights/interests over land as security for debt.

The major role of the Primary Lending institutions in any free market economy is to transfer and direct funds from the financial surplus units of the economy to such areas as such funds are required in order to ensure growth and uniform development.⁷ These lending institutions are

⁴ Nwuba, C.C.; Egwuatu, U.S.; Salawu, B.M., 'The Application of Real Estate as Loan Collateral in Nigeria's Banking Sector' (2013) Volume 4 Number 11 *Research Journal of Finance and Accounting*. <http://www.academia.edu/6582723/The_Application_of_Real_Estate_as_Loan_Collateral_in_Nigeria's_Banking_Sector> accessed 2 October 2014.

⁵ *ibid.*

⁶ Oniekoro, F.J. *Mortgages in Nigeria: Law and Practice*, (Enugu: Chenglo Publications, 2007) 1.

⁷ Agbakoba, O., 'Debt Recoveries and the Judicial System.' (delivered 25 November 1992 at the Association of Banks Lawyers Conference) <www.agbakoba-associates.com/Debt-Recoveries-and-the-Judicial-System-A-Call-for-Alternative-Debt-Recovery-Mechanisms-and-the-Establishment-of-Commercial-Courts.pdf> accessed 5 September 2014.

financial arbiters. They perform such a vital role in the development of the economy of every nation as they act as the channel through which funds are conducted towards specific and general requirements of other sectors in the economy. It is pertinent that these lending institutions are able to sustain this duty. In order to achieve this, it is crucial that the proportion of outflow to inflow of funds to these institutions should be equal at the least. In no situation should the outflow of funds exceed the inflow of funds. In the event of a default, recovery must be made from those sectors to which such funds have been channelled. However, this is not always the case.

Having established the link between real property and the Primary lending institutions which gives rise to the mortgage transaction, it is therefore pertinent to consider not merely how the lending institutions are able to generate and keep funds in the event of default by the mortgagor but also how effective the methods of debt recovery are. This is the crux of this research.

In the case of default by the mortgagor, the remedies open to the mortgagee in recovering his capital and/or interest are:

- Action to recover mortgage sum and interest
- Taking possession of the security
- Appointing a receiver
- Sale of the security
- Foreclosure
- Action for order of specific performance.

The choice of remedy opted for depends on whether the mortgagee wants his capital or the interest.

The rights/remedies of the mortgagee are cumulative. This means that the exercise of one option

is not to the ultimate exclusion of the other. In other words, if the mortgagee exercises an option and that option is not enough to satisfy the debt owed him, he can choose another remedy to recover the balance. However, the exercise of the option of an order of foreclosure terminates all other remedies.

1.2 STATEMENT OF PROBLEM

Financial institutions do not always realize the security employed in obtaining loans from them. Experience over the years show that many credit customers of banks default in their payment obligations.⁸ The implications of this default are evident in: deterioration in the quality of risk assets, rise in the level of non-performing loans and advances (NPL), increase in the required loan loss provision, decrease in the level of profitability which may lead to losses, impairment of capital and collapse of the institution, loss of confidence in the banking system. This ultimately undermines the entire financial system and has a lasting impact on the economy of the nation. Therefore, it is imperative that options are available to the mortgagee in ensuring that he is not left without a recourse.

Another problem is that many mortgagees do not avail themselves of the remedies at their disposal. This may be due to their lack of insight into what each remedy entails. They have a limited perspective on the entrenched rights they have over the security when the mortgagor defaults. It has been discovered that there is a tendency for mortgagees to focus on a particular remedy to the exclusion of others. The remedy of sale has been discovered to be the most common remedy. This may not be appropriate in all circumstances.

⁸ Imala, O.I., 'The Debt Dilemma in the Nigerian Banking Industry: Trends and Implications for the Economy.' (delivered at the 2004 National Seminar on Banking and Allied Matters for Judges) in *Proceedings of the 2004 National Seminar on Banking and Allied Matters for Judges*, E. Ogunleye, M. Ogubunka, A. Anameje, C. Ughele, T. Ige (eds), (Lagos: The CIBN Press Limited 2005) 63.

A very crucial aspect of land law is mortgage as it is linked to the financial system. It is supposed to have a body of law guiding it. However, this is not the case, recourse is still being made to the Conveyancing Act of 1881. Cumbersome and outdated regulatory framework of mortgage in Nigeria in relation to the remedies available to the mortgagee is an issue. Poor titling of real estate also poses problems in its enforcement. There is also the issue of unenforceable judgment even after the delivery of judgment which may find its reasons in the fact that: the debtor's security attached to the loan advanced is not enough to realize the judgment debt especially due to the incorrect valuation of the property; delayed court proceedings and the fact that judges are not well informed of the principles of law applicable to mortgage also pose a great challenge.

All the above constitute great challenges to the prompt enforcement of mortgage security in Nigeria.

1.3 OBJECTIVE OF THE STUDY

Against this background, the objectives of the study would be:

1. To ascertain the remedies available to the mortgagee in the recovery of the mortgage debt.
2. To analyse the processes involved in exercising the different remedies available to the mortgagee.
3. To evaluate the efficacy of each of the remedies and challenges inherent in each remedy.
4. To identify the problems relating to prompt realization and enforcement of mortgage security in Nigeria.
5. To proffer possible recommendations as regards tackling the challenges hindering the prompt enforcement of each remedy.
6. To establish whose role it is to enforce judgment. Is it solely the mortgagee or the courts?

Ultimately, to ensure that the mortgagee in exercising the option of the remedies at his disposal, chooses that which will be most beneficial to him.

1.4 RESEARCH QUESTIONS

To achieve the ultimate end of this research, certain questions will be posed which will be effectively answered in the course of this work. These principal questions are:

1. What are the remedies available to the mortgagee in order to recover the mortgage debt?
2. What processes are involved in the exercise of each of the remedy at the mortgagee's disposal?
3. How effective is each remedy in the recovery of the mortgage debt and what distinguishes one from the other?
4. Are there challenges inherent in the exercise of each of the remedies and in the general enforcement of mortgage security in Nigeria? If yes, what are those challenges?
5. How can these challenges be effectively resolved for the ultimate improvement of the mortgage market and the economy at large?
6. Whose role is it to enforce judgment on the mortgage?

1.5 SIGNIFICANCE OF THE STUDY

Land is very important and permeates all facets of human existence and livelihood. The importance of accommodation to man cannot be undermined. This study is particularly important because mortgage constitutes almost 80% of the security for banks. Land continues to be the chief source of security for lending within and outside the banking sector.⁹ Therefore the importance of a working mortgage transaction to the growth and sustenance of the economy is non-negligible. It

⁹ Chianu, E. *Law of Securities for Bank Advances (Mortgage of land)*, (Edo: Ambik Press, 2000) 2.

gives an insight into how working mortgage transactions can be achieved right up to the enforcement of the mortgage security by the mortgagee.

This research work seeks to enlighten law students, lecturers, lawyers, judges, the commercial sector and other stakeholders as it takes the notion of mortgage in Nigeria a notch higher by its consideration of how exactly mortgage security is realized and enforced in Nigeria even after judgment. This is particularly significant because it sheds more light on the intricacies involved in the enforcement of mortgage security in Nigeria as opposed to existing texts which merely state the methods of enforcement of mortgage security without more.

1.6 RESEARCH METHODOLOGY

This work is a qualitative study. The main research methodology employed in this work is doctrinal involving literature review of both primary and secondary sources. The primary sources employed are statutes and case law while the secondary sources used are books, articles, journals, publications, reports, lecture materials, internet resources and documents generally on mortgage. The research methodology also inculcates certain aspects of comparative analysis as regards juxtaposing one remedy with another in terms of its advantages and setbacks/challenges.

1.7 SCOPE OF STUDY

This research work covers the subject of mortgage and its processes. Its scope is limited to the enforcement of mortgage security in Nigeria. The comparative analysis method has been adopted in this work. The various remedies available to the mortgagee have been juxtaposed to have an understanding of the best applicable remedy for each situation. Although other aspects of the mortgage transaction in Nigeria such as the nature of mortgage, types of mortgage may be fleetingly mentioned, they are not the main crux of this research.

Also, although there are other mortgage institutions, banks as mortgage institutions have been highlighted in this work. This is due to the fact that about 80% of bank loans are based on mortgage security.

It deals with the financial and housing sector of the economy. It covers three key areas: finance, housing/land and law. Thus terms are employed from these fields.

1.8 LIMITATIONS OF STUDY

Although there are quite a number of articles and texts on the methods of enforcement of mortgage security in Nigeria, the efficacy of each method and the enforcement of judgment on any of the remedies is sparsely recorded. The paucity of materials on the specific areas under consideration have also posed a great challenge.

1.9 OPERATIONAL DEFINITION OF TERMS

Land is defined in Section 2 of the Property and Conveyancing Law 1959 as including the earth surface and everything attached to the earth otherwise known as fixtures and all chattels real. It also includes incorporeal rights like a right of way and other easements as well as profits enjoyed by one person over the ground and buildings belonging to another. In this context, land will be used interchangeably with real property.

Mortgage is the transfer of interest in land as security for the discharge of a debt or the performance of an obligation subject to redemption.¹⁰ A mortgage in itself is not a debt, it is the lender's security for a debt.¹¹

¹⁰ Oniekoro, F.J. *Mortgages in Nigeria: Law and Practice*, (Enugu: Chenglo Publications, 2007) 1.

¹¹ <http://en.m.wikipedia.org/wiki/Mortgage_law> accessed 6 October 2014.

Mortgagor is the transferor of the interest in land as security for the discharge of a debt is known as the mortgagor. Mortgagors are usually individuals or artificial juristic persons.

Mortgagee is one to whom property is mortgaged; the mortgage creditor, or lender.¹²

Mortgage debt or sum is the sum of money over which the interest is transferred.

Security is collateral given or pledged to guarantee the fulfilment of an obligation; especially the assurance that a creditor will be repaid (usually with interest) any money or credit extended to a debtor.¹³

1.10 SYNOPSIS OF CHAPTERS

Chapter two examines the scope of the topic by a detailed literature review of existing texts on the subject. It explores the concept of mortgage security in Nigeria by detailing secured credit transactions, the history of mortgage practice in Nigeria and its nature generally, mortgage institutions in Nigeria, legislation on mortgage in Nigeria and the types of mortgage in Nigeria. It further highlights the advantages of security in the mortgage transaction as well as the import of the equity of redemption in this study.

Chapter three studies the different methods available to the mortgagee in the enforcement of mortgage security in Nigeria. These methods are the remedies accruing to the mortgagee in case of default by the mortgagor. Each remedy is highlighted and methodically detailed to give an insight into the processes involved in developing each technique.

Chapter four highlights the efficacy of each of the enforcement methods in security realization. It examines the existing regulatory framework that provides for the enforcement of mortgage

¹² Bryan A. G. (ed), *Black's Law Dictionary* (8th Edition, U.S.A: Thomson West, 2001).

¹³ Bryan A. G. (ed), *Black's Law Dictionary* (8th Edition, U.S.A: Thomson West, 2001).

security in Nigeria and the challenges involved in the effective enforcement of mortgage security in Nigeria.

Chapter five is a summary of the work and a conclusion with recommendations for the Nigerian Mortgage sector in effecting a general operative mortgage transaction especially in the aspect of debt recovery.

CHAPTER TWO: LITERATURE REVIEW

2.1 DEFINITION OF MORTGAGE

A mortgage is a form of security over land or other titled properties for a debt or obligation made by a debtor to a creditor against the promise of assurance to repay the debt with or without interest at a future date.¹⁴ The nature of a mortgage transaction involves a **Mortgagor** who is the transferor of the interest in land, the **Mortgagee** who is the transferee of the interest in land, and the **Mortgage sum (debt)** which is the sum of money over which the interest is transferred.

In *Adetona & Anor. v Zenith International Bank Plc*¹⁵, Chukwuma-Eneh, JSC stated that in a proper mortgage, the title to the property must have been transferred to the mortgagee subject to the proviso of the mortgaged property being reconveyed by the mortgagee to the mortgagor upon performing the condition stipulated in the mortgage deed and invariably upon payment of the debt at the time so stipulated in the deed of mortgage. It was further defined as a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty, and that will become void upon payment or performance according to the stipulated terms. It is the creation of an interest in a property defeasible (i.e. annulable) upon the performing of the condition of paying a given sum of money with interest at a certain time.

In *P.I.P. Ltd. v Trade Bank (Nig.) Plc*¹⁶ a mortgage was defined as a conveyance of a legal or equitable interest in property as a security for the payment of debt or the discharge of some other

¹⁴ Olulana, O.J.A. *The Law and Practice of Banking, Collateral Securities and Mortgages*, (Lagos: Diversities Enterprises Publishers, 2000) 246.

¹⁵ (2011) 12 SC (Part IV) 44; (2011) 18 NWLR (Part 1279) 627 S.C.

¹⁶ (2009) 13 NWLR (Part 1159) 577 C.A.

obligations for which it is given. It is subject to the condition that the title shall be re-conveyed if the mortgage debt is liquidated.

Oniekoro¹⁷ defines mortgage as the transfer of interest in land as security for the discharge of a debt or the performance of an obligation subject to redemption. He further states that though the transaction is essentially between two parties (mortgagor and mortgagee) a third party may be involved as a guarantor or as a head lessor giving or confirming his consent to the assignment or sub-lease of the leasehold interest used as security for the loan or it may involve the mortgaged property where the owner is different from the borrower. In order to confirm the grant of the necessary consent where there is a covenant not to assign or sublet in the headlease or where a guarantee is required, the original grantor of the lease or a person affording a guarantee, may be a party to the transaction. In such instances, the mortgage transaction will be tripartite.

Dadem¹⁸ describes mortgage as a property transaction where owners of estates in land use the land as collateral to secure a sum of money. In stating the definition of mortgage as “*always been tricky and difficult,*” he points out Lord MacNaughten’s assertion that: “*No one...by the light of nature ever understood an English Mortgage of real estate.*”¹⁹ He also cites cases that define mortgage. In *Olowu v Miller Bros Limited*²⁰ mortgage was defined as a security created by contract for the payment of a debt already due or to become due. In *Adenekan v Owolewa*²¹ it was defined as an ordinary contract between the mortgagor and the mortgagee. In *Intercity Bank Plc v Feed & Food Farms Nig. Ltd.*,²² it was defined as a conveyance of property as security for a debt, which is lost

¹⁷ Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 1.

¹⁸ Dadem, Y.Y.D. *Property Law Practice in Nigeria*, (Jos-Nigeria: Jos University Press Limited, 2009) 115.

¹⁹ *Samuel v Jarrah Timber and Wood Paving Corporation* (1904) AC 323 at 326.

²⁰ (1922) 3 NLR 110; Per Pennington J.

²¹ (2004) ALL FWLR (Part 216) 510.

²² (2002) FWLR (Part 128) 1289.

or became dead to the debt if the money or the interest due on it is not paid on a certain date. Although the definitions of a mortgage in the two initial cases seem insufficient in themselves, their combination with the third gives a clearer picture of a mortgage transaction. They jointly identify mortgage as a security, as a contract between parties (the mortgagor and mortgagee), and as involving the payment of a debt which is due or to become due at a certain date.

Dadem crowns the various definitions— a mortgage may be defined as an agreement which may be expressed by deed between persons in which a borrower of a sum of money puts up his property as collateral for the money given with the understanding that the property will be conveyed back to him upon the repayment of the money and any interest on it.²³ He identifies the most important feature of a mortgage as being a conveyance of a legal or equitable interest in property with a provision for redemption that is, that upon the repayment of the loan, the conveyance shall become void or the interest shall be re-conveyed.²⁴ Other features of a mortgage highlighted by him are:

- Conveyance of an interest in land to a lender of money
- The land is held only as security or collateral to ensure repayment of the money loaned.
- The property is re-conveyed back to its owner when the money loaned is repaid.
- In the event of a failure to repay the money advanced the lender of the money has the right to sell the land to realize the money advanced. He could also exercise other remedies to ensure payment.

Imhanobe²⁵ highlights the fact that a mortgage may be legal or equitable and the sole object of the mortgage as opposed to other similar transactions is that the interest in the property transferred by

²³ Dadem, Y.Y.D. *Property Law Practice in Nigeria*, (Jos-Nigeria: Jos University Press Limited, 2009) 116.

²⁴ *B.O.N. Ltd v Akintoye* (1999) 12 NWLR (Part 392) 403.

²⁵ Imhanobe, S.O. *Legal Drafting & Conveyancing (with precedents)* (3rd edition, Abuja: Temple Legal Consult, 2010) 526.

the borrower to the lender is subject to a proviso for redemption upon repayment of the loan. This is reiterated in Osamolu *et al*²⁶ that the major distinguishing factor between a mortgage and other forms of interest is that it is essentially a security transaction.

2.1.1 Mortgage Distinguished From Other Similar Transactions.²⁷

A mortgage may be best appreciated when distinguished from other forms of security transactions. These transactions have their varied legal effects and consequences. In comparison to a mortgage, those transactions are:

Pledge: involves the transfer of possession of a thing to another as security for a debt subject to redemption. Transfer of possession is key to a pledge. The pledgee has only this possessory right therefore he cannot sell the property, he cannot foreclose the interest of the pledgor without the court's order.²⁸ Also, unlike a mortgage a pledge is perpetually redeemable. Generally, a pledgee is not duty bound to give account of the pledged property while in possession.

Lien: this is a right in a person to retain the property of another, which is in his possession, till certain demands of him are satisfied whereas the mortgagee need not be and is usually not in the possession of the security.²⁹ Also, ownership of the subject of the lien is not vested in the claimant as is obtainable in a mortgage where the mortgagee has interest in the mortgaged property.

Charge: a mere appropriation of a specified property in discharge of a debt. No transfer of possession or interest in the property is made to the charge. Hence, unlike a mortgage the charge has no right of sale except specifically provided by statute.

²⁶ Osamolu S.A, Oduwale O.T, Oba C.O. *Real Property Law and Conveyancing Practice in Nigeria*, (Abuja: Lawlords Publications, 2008) 262.

²⁷ As highlighted in Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 4-9.

²⁸ *Adjei v Dabanka* (1930) 1 W.A.C.A. 63.

²⁹ Especially to avoid strict accountability. *White v City of London Brewery Co. Ltd.* (1889) 42 Ch. 237.

Sale: transfer of total interest of a person in a property. This is different from a mortgage in that in a mortgage the right to redeem exists but the transfer in a sale is absolute to the purchaser in consideration paid by the purchaser to the vendor.³⁰

2.2 THE CONCEPT OF MORTGAGE SECURITY IN NIGERIA

Every mortgage transaction is predicated on three (3) major factors: (i) Protection, (ii) Assurance and, (iii) indemnification. Protection of the mortgagee's rights through the mortgage security, Assurance of a recourse in the event of default and Indemnification of the mortgagee to the state he was in before the default. The prevalent difficulty in the recovery of loans has resulted in banks operating in economies as Nigeria insisting on secured credit facilities before granting loans.³¹ Notwithstanding the importance of security (or "collateral"), it is pertinent to establish that the key objective of a secured credit is to ensure the repayment of loans by the borrower and not a venture to acquire assets by the lender.³²

Security is "*a right given to one party in the assets of another party to secure payment or performance by that other party or by a third party.*"³³ In banking parlance, this suggests a debtor-creditor relationship in which the debtor owes some financial obligation to the creditor.³⁴ Here, the debtor assigns proprietary rights in the asset ("collateral") to the creditor to hold onto pending the repayment of the sum ("mortgage debt") to the creditor.

³⁰ Dadem, Y.Y.D. *Property Law Practice in Nigeria*, (Jos-Nigeria: Jos University Press Limited, 2009) 118.

³¹ Imala, O.I., 'The Debt Dilemma in the Nigerian Banking Industry: Trends and Implications for the Economy.' (delivered at the 2004 National Seminar on Banking and Allied Matters for Judges) in *Proceedings of the 2004 National Seminar on Banking and Allied Matters for Judges*, E. Ogunleye, M. Ogubunka, A. Anameje, C. Ughele, T. Ige (eds), (Lagos: The CIBN Press Limited 2005) 63.

³² Igweike, K.I. *Law of Banking and Negotiable Instruments*, (Onitsha-Nigeria: Africana First Publishers Limited, 2005).

³³ Goode R.M., 'Legal Problems of credit and Security' in: Smith I.O. *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications Limited, 2006) 4-5.

³⁴ Smith, I.O. *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications Limited, 2006).

2.2.1 The History of Mortgage Practice in Nigeria

Formal mortgage market was introduced in Nigeria with the establishment of the Nigeria Building Society in 1956. The Common Wealth Development Corporation was the vehicle that was used for this capital investment. However, the Building Society collapsed in the early seventies because of its inability to perform its statutory functions. Consequently, the government injected N20m into it and changed its name to the Federal Mortgage Bank of Nigeria (FMBN).³⁵ The FMBN was not without issues;³⁶ its failure over the years and acute shortage of housing led to the promulgation of the National Housing Policy of 1991. This was promulgated to strengthen housing finance. The National Housing Policy and Mortgage Institutions Decree No. 53 1989 restructured the Nigerian mortgage market.³⁷ The Nigerian mortgage market was divided into two tiers: (i) the FMBN as the apex (licensing and supervisory) mortgage bank and (ii) Primary Mortgage Institutions (PMIs). Presently, there are eighty-two PMIs in operation in Nigeria.³⁸

2.3 IMPORTANCE OF SECURITY IN MORTGAGE TRANSACTIONS

Security provides the creditor with an alternative source of recoupment if the debtor either cannot or will not pay voluntarily.³⁹ Any good security must ensure protection, assurance and indemnification. More specifically, it:

- Reduces the incidents of risk or eliminates it in respect of a creditor's investment.

³⁵ Oduwaye L., Oduwaye O.S., Adebamowo M.E., 'Challenges of Housing Finance by Primary Mortgage Institutions.' <www.gla.ac.uk/media/media_129719_en.pdf> accessed 26 December 2014.

³⁶ A prevalent issue till now is the major challenge of how to recover the huge sums owed to it and the lack of sufficient funds to perform its statutory functions. --- Imhanobe, S.O. *Legal Drafting & Conveyancing (with precedents)* (3rd edition, Abuja: Temple Legal Consult, 2010) 530.

³⁷ Mogaji, P.K., 'The Nigerian Mortgage Banking Sub-sector reforms: The expectations.' <Kenny-morgans.blogspot.com/2011/09/Nigerian-mortgage-banking-sub-sector.html?m=1> accessed 26 December 2014.

³⁸ <www.cenbank.org/Supervision/Inst-PMI.asp?NAV=1> accessed 26 December 2014.

³⁹ Omotola, J. *The Law of Secured Credit*, (Ibadan: Evans Brothers, 2006) 4.

- Increases the pool of assets out of which the creditor may satisfy his claim thus giving him a preferred position in the insolvency or liquidation of the debtor.
- Demonstrates the debtor's good intention to meet his obligations and provides an incentive on the part of the creditor to provide credit.⁴⁰
- By reducing the risk, security reduces the cost of credit by reducing the interest payable.⁴¹
- The secured creditor has priority over an unsecured creditor. Security is an assurance of certainty of repayment as opposed to mere possibility of enforcing a claim by action of debt. This is advantageous because the borrower who solemnly promised to repay on the due date may turn out to be very adamant when called upon to fulfil his financial obligations to the lender.

Generally, some types of security that may be acceptable to banks are:

Goodwill: Natural security without insistence on collateral securities; also known as policy lending, clean lending, special lending, unconditional lending.⁴²

Lien: aptly described thus: “*wherever a banker has advanced money to another, he has a lien on all paper securities which come into his hands for the amount of his general balance.*”⁴³

⁴⁰ Smith I O. *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications Limited, 2006) 2.

⁴¹ Pedrazzini & Simpson, ‘The legal framework for Secured credit: A suitable case for Treatment’ in: Smith I.O. *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications Limited, 2006) 3.

⁴² Olulana, O.J.A. *The law and Practice of Banking, Collateral Securities and Mortgages*. (Lagos: Diversities Enterprises Publishers, 2000) 199. Although Section 18(1)(b) of the Banks and Other Financial Institutions Act (BOFIA) 1991 prevents unconditional lending to an extent. It provides to the effect that no manager or any other officer of a bank shall grant any advance, loan or credit facility to any person, unless it is authorised in accordance with the rules and regulations of the bank; and where adequate security is required by such rules and regulation; such security shall, prior to the grant, be obtained for the advance, loan or credit facility and shall be deposited with the bank.

⁴³ Lord Kenyon CJ in *Davis v Bowsher* (1774) 5 Term Rep. 488 in: Olulana, O.J.A, *The law and Practice of Banking, Collateral Securities and Mortgages*. (Lagos: Diversities Enterprises Publishers, 2000) 200.

Pledge: deliberately handing over securities to the banker with a view to securing an overdraft or other advances.⁴⁴

Hypothecation: the process where things of merchandisable value are pledged to the banker either in simple form or by deed as security for lending.⁴⁵

Trust Receipt: an authorization issued by a banker or financier of a specific consignment of merchandise to a selling agent usually the borrower's employee or nominee authorizing the sale/return remittance of the proceeds of the sale from such goods to the banker.⁴⁶

Other forms of security are: landed property, life assurance policies, stocks and shares, debentures, goods and documents of title to goods and guarantees. The choice of form of security for a particular lending depends on the following:⁴⁷

- The amount of money (mortgage debt)
- The easy realization or otherwise of the particular form of security being considered.
- The relationship of the parties
- The status of the prospective borrower, individual, corporate body; business partnership, sole trader; tier of government, government agency or parastatal.
- Whether the prospective lender can easily perfect and acquire effective title to the security being considered in case of a default.

From the foregoing, it is observed that most of the factors stated are so linked to the feasibility/viability of the recovery of the credit facility through the security.

⁴⁴ Olulana, O.J.A. *The law and Practice of Banking, Collateral Securities and Mortgages*. (Lagos: Diversities Enterprises Publishers, 2000) 201.

⁴⁵ Ibid at page 202.

⁴⁶ Ibid at page 203.

⁴⁷ Ibid at page 203.

2.4 LAND AS THE BEST SECURITY FOR A MORTGAGE TRANSACTION⁴⁸

The main focus of this work is to assess land (and all its appurtenances) as a security for mortgage transactions in Nigeria. The preference for land as a form of security is not unconnected to the fact that its economic value appreciates over time. During inflation with its attendant fall in money value, land is a veritable source of compensation to the creditor as it appreciates in value.

It is easily ascertainable and assessable despite difficulties posed by the Land Use Act of 1978⁴⁹ because it is a more stable asset than other assets. There is a psychological attachment of indigenous people to land which may compel the borrower to do all it takes to avoid the realization of his land as security, and prospective buyers are generally available in the event of any realization.⁵⁰

In addition to this, the availability of land as the source of raw materials and cash crops makes it more desirable as a form of security. Effective encumbrances may be created conveniently in favour of creditors while the debtor remains in possession without hindrance.⁵¹

In modern times, land provides a reliable and invaluable security for loans and advances. This is because of the definiteness of land as a permanent property and its certainty of title and reliable registration system of interest relating to it.⁵² Unlike most property, land titles are usually denoted on title deeds, registers of title or instruments. This protects the creditor either as a registered encumbrance, holder of an overriding interest on registered land or holder of the title deeds to the

⁴⁸ Although with the advent of the Land Use Act 1978 the value of land as security for advances has waned, yet land continues to be the chief source of security for lending within and outside the banking sector. In Chianu E. *Law of Securities for Bank Advances (Mortgage of Land)*, (Edo: Ambik Press, 2000) 2.

⁴⁹ CAP L5, Laws of the Federation of Nigeria 2004.

⁵⁰ Igweike, K.I. *Law of Banking and Negotiable Instruments*, (Nigeria-Onitsha: Africana First Publishers Limited, 2005).

⁵¹ Smith, I.O. *Nigerian Law of Secured Credit*. (Lagos: Ecowatch Publications (Nigeria) Limited, 2006) 33.

⁵² Olulana, O.J.A. *The Law and Practice of Banking, Collateral Securities and Mortgages*, (Lagos: Diversities Enterprises (Publishers), 2000) 214.

mortgagor's unregistered estate. The creditor has a reassuring grip on the security since it is immovable.⁵³

However, this does not mean that land does not come with certain intricacies that hinder its prompt realization. This work highlights some complications that may be encountered in its realization. It starts from the cumbersome and thorough legal prerequisites to be complied with in its realization to the various complexities of statutory law which regulate and affect land as a form of security in Nigeria.

2.5 MORTGAGE INSTITUTIONS IN NIGERIA

Several institutions for mortgage transactions in Nigeria include:

Federal Mortgage Bank: This is the apex institution for mortgage transactions in Nigeria.

The Federal Mortgage Bank was established pursuant to Section 1 of the Federal Mortgage Bank of Nigeria Act.⁵⁴ In *F.M.B.N. v. Lagos State Govt*,⁵⁵ the function of the bank as highlighted in Section 5 of the Act that establishes it was stated as providing long-term credit facilities to Primary Mortgage Institutions (PMIs) in Nigeria; license, control and encourage the growth of secondary mortgage institutions, as well as collect, manage and administer the National Housing Fund. It gives the PMIs loan at a rate of 4%. The loan from the PMI is given on a long-term (30 years) with interest as minute as 6%. The Federal Mortgage Bank has its head office located in the Central Business District, Abuja with branches in the State capitals. As highlighted in Imhanobe,⁵⁶ the Bank faces the major

⁵³ Smith, I.O. *Practical Approach to Law of Real Property in Nigeria* (2nd edition, Lagos: Ecowatch Publications (Nigeria) Limited, 2007) 353.

⁵⁴ Cap. F16 Laws of the Federation of Nigeria 2004.

⁵⁵ (2010) 5 NWLR (Part 1188) 570 at 594.

⁵⁶ Imhanobe, S.O. *Legal Drafting & Conveyancing (with Precedents)* (3rd edition, Abuja: Temple Legal Consult, 2010) 530.

challenge of recovering the huge sums owed to it and the lack of sufficient funds to perform its statutory functions.

Housing Corporations: The Federal Housing Authority (FHA) is the most prominent of these corporations with the Federal Housing Authority Act 1990⁵⁷ as its enabling provision. The functions of the FHA are: to recommend to government National Housing Programme and the execution of such programmes, provide funds for building and sometimes build house and offer them for sale to the public.

Housing Schemes: This is basically for the benefit of employees and is provided by the employer for the purpose of enabling them to acquire their own houses. The employer gives loan on the security of the property. The interest rate in these cases is usually very low even as low as 2% in some instances. However, due to lack of funds, only very few organizations are able to continue the operation of this scheme.

Commercial Banks: The fact that commercial banks now have subsidiaries that engage in mortgage banking has to an extent propagated the mortgage industry in Nigeria. Usually, the customer saves between 20-40 percent of the price of the property while the bank provides the balance. The period of repayment is between 5 to 10 years with the interest rate being negotiable. However, it has been asserted that the interest in the commercial banks is not as reasonable as FHA and the Housing Corporations.⁵⁸

Private Property Developers: Private property developers develop estates for sale to the public on a mortgage basis.

⁵⁷ CAP 136 Laws of the Federation of Nigeria 2000.

⁵⁸ Imhanobe, S.O. *Legal Drafting & Conveyancing (with Precedents)* 3rd edition (Abuja: Temple Legal Consult, 2010) 531.

Life Endowment: In this case, the insurance company may provide money for the purchase of the property or guarantee loan from the bank. It is a policy of life insurance and a form of savings. The process involves the borrower assigning the life policy to the bank and notice of the assignment is given to the insurance company. Although life assurance as security is good, yet the bank may have to wait for the number of years stated in the policy before it can realize the security or wait till when payment is due on the death of the borrower. The main challenge with this is that Nigerians generally are lethargic towards insurance.⁵⁹

Although some of these institutions may not be in direct contact with the mortgagor at all material times, their indirect impact is very important. They are the channel through which the Primary Mortgage Institutions (PMIs) that are in direct contact with the mortgagor have funds.

2.6 LEGISLATION ON MORTGAGE IN NIGERIA

Laws applicable to mortgages in Nigeria are⁶⁰:

1. Land Use Act (LUA)⁶¹
2. Conveyancing and Law of Property Act (C.A) 1881.
3. Property and Conveyancing Law (PCL)⁶²
4. Registered Titles Law (RTL)⁶³
5. Stamp Duties Act⁶⁴

⁵⁹ Imhanobe, S.O. *Legal Drafting & Conveyancing (with Precedents)* 3rd edition (Abuja: Temple Legal Consult, 2010) 531

⁶⁰ Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 9

⁶¹ CAP. L5 Laws of the Federal Republic of Nigeria 2004.

⁶² CAP. 100 Laws of Western Region of Nigeria, 1959.

⁶³ CAP. L4 Laws of Lagos State 2003.

⁶⁴ CAP. S8 Laws of the Federation of Nigeria 2004.

6. Land Instrument Registration Law (LIRL)
7. Land Registration Act (LRA)
8. Illiterate Protection Act
9. Statute of Fraud 1677
10. Infant Relief Act.
11. Law Reform (Contract) Act.
12. Law Reform (Contract) Law⁶⁵
13. Companies and Allied Matters Act (CAMA)⁶⁶
14. Common law and doctrines of equity.

Other general laws that may be applicable to mortgage transactions in Nigeria are: Judicial Precedents, for example, *Savannah Bank of Nig. Ltd. v. Ajilo*,⁶⁷ *Awojugbagbe Light Industries v. Chinukwe & Ors*;⁶⁸ Codes of Commercial Practice, International law and Conventions.

2.7 CLASSIFICATION AND MODES OF CREATION OF MORTGAGE

The method of creating mortgages in Nigeria varies according to the applicable law and the nature of interest which forms the subject of the mortgage.⁶⁹ In Nigeria, there are basically two modes of creating a mortgage. They are:

1. Legal Mortgage
2. Equitable Mortgage

⁶⁵ CAP. 114 Laws of Lagos State 1994.

⁶⁶ CAP. C20 Laws of the Federation of Nigeria, 2004.

⁶⁷ (1989) 1 NWLR (Part 97) 305.

⁶⁸ (1995) 4 SCNJ 162.

⁶⁹ Smith I.O. *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications Limited, 2006) 38.

One type of mortgage should be distinguished from the other as each has its legal consequences. The method and processes involved in its creation dictate the type of mortgage concerned. The starting point in differentiating between both is the fact that a legal mortgage involves the transfer of legal interest in land (whether leasehold or freehold) while equitable mortgage involves the transfer of equitable interest in land with the interest serving as security for loan made subject to redemption upon repayment of the debt and interest.⁷⁰

2.7.1 Legal Mortgage

The method of creation of a legal mortgage in Nigeria is dependent on the state where the property is situate. The validity of such mortgage is based on its compliance with the existing law of the state and in addition to the law of the state where the property is situate where both are not the same. The applicable laws are subject to the provisions of the Land Use Act 1978. Thus, there are three applicable laws in the creation of a legal mortgage. These are:

Conveyancing Act, 1881 (CA) which is applicable in the Northern and Eastern states of Nigeria. (And parts of Lagos that are outside the RTL).

Property and Conveyancing Law, 1959 (PCL) which is applicable in the states comprising of the old western Nigeria. These are Ogun, Oyo, Osun, Edo, Ondo and Delta states.

Registration of Titles Law (RTL) applicable in some parts of Lagos State.

The legal mortgage must be done in the proper form. This proper form is the use of deeds or the use of statutory forms that are usually provided in the statutes mentioned above (C.A., PCL, and RTL). A deed is a document which passes interest in property or which binds a person to perform

⁷⁰ Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 34.

or abstain from doing an action. It furnishes evidence or information about something.⁷¹ At common law, it is any written instrument that is signed, sealed and delivered and that conveys some interest in property.⁷²

In the **Conveyancing Act** states, there is no statutory provision on the mode of creation of legal mortgage in the Conveyancing Act. So, the applicable law is the common law provisions as regards the creation of a legal mortgage. This is subject to the provisions of the Land Use Act, 1978. Under the Land Use Act landowners do not have freehold interest but leasehold interest as all land in the state is vested in the Governor of that state to hold in trust for the people.⁷³ At common law, legal mortgage of leasehold interest may be created by any of the following ways:

1. Assignment of the unexpired interest of the mortgagor to the mortgagee subject to a provision for cesser on redemption.
2. Sub demise for a term of years absolute subject to a provision for cesser on redemption.

The difference between the two modes of creation of a legal mortgage lies in the fact that an assignment transfers to the mortgagee the unexpired interest of the mortgagor while the sub-demise transfers only a term of years.⁷⁴

In the **Property and Conveyancing Law** states, a mortgage for a term of years absolute shall only be capable of being effected at law either by⁷⁵:

⁷¹ Odgers', D.G. 'Construction of Deeds and Statutes' in Dadem, Y.Y.D. *Property Law Practice in Nigeria*, (Jos-Nigeria: Jos University Press Limited, 2009).

⁷² Bryan A. G. (ed), *Black's Law Dictionary* (9th edition, U.S.A: Thomson West, 2001) 475.

⁷³ Section 1 Land Use Act, 1978.

⁷⁴ Imhanobe, S.O. *Legal Drafting & Conveyancing (with Precedents)* (3rd edition, Abuja: Temple Legal Consult, 2010) 537.

⁷⁵ Section 109, Property and Conveyancing Law 1959.

1. Sub demise for a term of years absolute, less by one day at least than the term vested in the mortgagor, and subject to a provision for cesser on redemption.
2. Charge by deed expressed to be by way of legal mortgage.

Based on the **Registration of Titles Law**, the creation of a legal mortgage is by way of a charge.⁷⁶

The registered owner of land may in the prescribed manner charge the land or lease with the payment of money to the like extent as if the land was not registered land.⁷⁷ The charge is created by completing and registering Form 5 for a charge or sub charge over registered land or property. The advantage of this mode of creation is that it is simpler, speedier and cheaper. Both in law and equity, the charge of a property does not change the ownership of the property but the chargee has the right to apply to court for an order of sale or appointment of a receiver.

2.7.2 Equitable Mortgage

This is the commonest form of mortgages. It does not require much formality and processes. It does not necessarily involve the consent of the Governor and registration.⁷⁸ Unlike the creation of legal mortgage that varies based on the location of the property, there is no variation amongst the states in Nigeria as to the creation of an equitable mortgage. The ways of creation of equitable mortgage are⁷⁹:

The deposit of title deeds with the intention to use it as security for loan: Where a title deed to land is deposited with the intention that it should be retained as security for a loan, an equitable mortgage is formed. This is in relation to the particular transaction and does not extend to money

⁷⁶ Using form 5 pursuant to section 18 RTL. - Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 72.

⁷⁷ Section 18, Registration of Titles Law.

⁷⁸ Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 20.

⁷⁹ An equitable mortgage can also be created if a mortgage fails to comply with a legal mortgage.

which has been advanced in the past and is already due. In *Russel v. Russel*⁸⁰ it was stated that an equitable mortgage may be created by the deposit of the title deeds with the intent to create a security over the property. It is not compulsory that all the envisioned title deeds be deposited, one material document incorporating what is actually deposited and the particulars of others deemed to be deposited will suffice.⁸¹

A deposit *simpliciter* has an equivocal connotation. The onus of proof is on the creditor to show that the deposited documents were given for purposes of security by way of equitable mortgage.⁸² In order to avoid difficulty in proving, it is pertinent that a memorandum, no matter how small, should be executed by the mortgagor containing the terms on which the deposit was made. In *African Continental Bank Ltd. v. Yesufu*,⁸³ it was held that the mere deposit of title deed with a bank will not constitute the bank an equitable mortgagee; the borrower shall sign a memorandum under seal contemporaneously with the delivery of the deed. Statutes also follow the case law position. For example, in Lagos and the PCL states⁸⁴ “every contract to enter into any mortgage or charge on land” is required to be in writing and “a disposition of an equitable interest must be in writing signed by the person disposing of the same.”⁸⁵ This may be executed as a deed or under hand. It is preferable that the memorandum of deposit be executed as a deed because the bank will be entitled to enforce their statutory power of sale irrespective that the security provided is equitable mortgage.

⁸⁰ (1783) 1 Bro. C.C. 269.

⁸¹ Re Daintry and Ryle, Re Ravenscroft, Exp. Arkwright (1843), 3 Mont. D & De G. 129; Exp. Wetherell (1805), 11 in: Olulana, O.J.A. *The Law and Practice of Banking, Collateral Securities and Mortgages*, (Lagos: Diversities Enterprises Publishers, 2000) 268.

⁸² *Chapman v Chapman* (1851), 13 Beav 308.

⁸³ (1977) NCLR p. 212.

⁸⁴ Oyo, Ogun, Osun, Ondo, Ekiti, Edo and Delta States of Nigeria.

⁸⁵ Section 5(1) (C) of the Law Reform (Contracts) Law of Lagos State (CAP 114 Laws of Lagos State of Nigeria, 1994) and Section 78 (1) (c) PCL in: Smith I.O. *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications Limited, 2006) 41.

The mortgage of an equitable interest: One cannot give what he does not have therefore where the interest of the mortgagor is itself equitable, the mortgage created thereon must be equitable.⁸⁶ For example, where legal mortgage at common law creates a second mortgage over the same property in favour of a subsequent mortgagee. Also, where a purchaser is granted a conveyance by a vendor and he is yet to perfect his title by the requisite processes, if he uses the same conveyance as security for a loan, only an equitable mortgage can be created.

An agreement to create a legal mortgage: An equitable mortgage is created where the mortgagor agrees with the mortgagee to execute a deed of mortgage at a future date and relying on that agreement, the mortgagee releases money to the mortgagor. Where title deeds are deposited as security for a loan, there are two legal implications:

- There is an implied agreement by the mortgagor to execute a legal mortgage in favour of the mortgagee.
- It is part performance.

Due to the herculean processes involved in the creation of legal mortgages, especially with the need to obtain the consent of the Governor, usually, the mortgagee may agree to release money sought to be borrowed by the mortgagor. This is based on the agreement by the mortgagor to, at any time in the future, when called upon by the mortgagee, execute a legal mortgage in favour of the mortgagee. In practice, parties insert in the memorandum of deposit a clause to empower the mortgagee to call on the mortgagor to execute the legal mortgage.⁸⁷

⁸⁶ *Nemo Dat Quod Non Habet*- “no one gives what he does not have.”

⁸⁷ Imhanobe, S.O. *Legal Drafting & Conveyancing (with Precedents)* (3rd edition, Temple Legal Consult, Abuja, 2010) 548.

Upon the default of the mortgagor, he will be compelled by the court in an action for specific performance by the mortgagee to execute a legal mortgage in favour of the mortgagee. This is based on the principle laid down in *Walsh v. Lonsdale*⁸⁸ that “*equity looks as done that which ought to be done*.” In *Ogundaini v. Araba & Or*,⁸⁹ it was held *inter alia* that equitable mortgage, by agreement to execute a legal mortgage can be enforced by order of specific performance. If successful, the mortgagee obtains legal estate and can pursue all the statutory remedies open to a legal mortgagee.

Equitable Charge of the mortgagor’s property: An equitable mortgage by charge is created where the property is merely appropriated or designated for the repayment of a loan without legal interest transferred to the lender of the money.⁹⁰

2.7.3 Mortgage by Operation of Law

Apart from legal and equitable mortgages, the court may infer a mortgage relationship from an arrangement involving instalmental payment by an allottee of property in circumstances where it would be inequitable to revoke such allotment for failure to pay an instalment. Thus in *Anambra State Housing Development Corporation v. Emekwue*⁹¹, the supreme court said that a statutory corporation with authority to build houses and sell on terms to people, was in some way a mortgagee to the buyer whom the court considered as mortgagor entitled to retain his equity of redemption even after the contractual date for payment of an instalment had passed. Therefore, the

⁸⁸ (1882) Ch.D. 9.

⁸⁹ (1978) NSCC VOL. 11 334. Also in *Yaro v Arewa Construction Ltd* (2008) All FWLA (Part 400) 603.

⁹⁰ Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 32. According to section 59(1) Registration of Titles Law, Lagos, the deposit by the registered owner of land or a charge of his certificate of title with the intention of mortgaging his land or charge shall have the same effect as does the deposit of the title deeds of unregistered land or mortgage deed of unregistered land with the same intention.”

⁹¹ (1996) 1 NWLR (Part 426) 505.

court held that the statutory corporation as mortgagee could not revoke an allotment when the allottee failed to keep up his payment by instalments for some weeks.⁹²

⁹² The decision of the Supreme Court in that case is in conflict with the established concept of a mortgage security as defined by Lord Lindley in *Santley v Wilde* (1899) Ch. P. 474. While Nigerian courts are not obliged to follow English decisions, the institution of the mortgage as a consensual security rather than one arising by operation of law is trite at common law-- Smith I.O. *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications Limited, 2006) 43.

CHAPTER THREE: METHODS OF ENFORCING MORTGAGE SECURITY IN NIGERIA

The importance of the financial sector is so phenomenal that failure of borrowers to repay loans lead to a high incidence of non-performing loans that ultimately lead to bank failure. This can be costly to the taxpayers and depositors. The prevalence of non-performing loans would reduce the funds available to be granted to the productive sectors of the economy like agriculture, manufacturing, mining and quarrying. It will also reduce the funds available for financing capital market activities.⁹³ In order to avoid these, certain remedies (legal and equitable) are open to the mortgagee.

3.1 REMEDIES AVAILABLE TO THE MORTGAGEE UNDER THE MORTGAGE TRANSACTION

The mortgagee's efforts are geared towards realizing a valuable security in the event of failure to repay the loan by the mortgagor.⁹⁴ The remedies available to the mortgagee under the mortgage transaction may also be regarded as the methods of realizing and enforcing this valuable security. These remedies ensure that to a large extent, the mortgagee (bank) has a recourse upon the mortgagor's default in his contractual obligation on the date fixed for payment of the mortgage debt. The remedies are cumulative and not necessarily in the alternative.⁹⁵ Therefore, the mortgagee has the option of exercising any of the available remedies.

⁹³ Imala, O.I., 'The Debt Dilemma in the Nigerian Banking Industry: Trends and Implications for the Economy.' (delivered at the 2004 National Seminar on Banking and Allied Matters for Judges) in *Proceedings of the 2004 National Seminar on Banking and Allied Matters for Judges*, E. Ogunleye, M. Ogubunka, A. Anameje, C. Ughele, T. Ige (eds), (Lagos: The CIBN Press Limited 2005).

⁹⁴ Smith, I.O. *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications Limited, 2006) 62.

⁹⁵ *UBN Plc v Olori Motors Co. Ltd* (1998) 5 NWLR (Part 551) 652; Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007).

The choice of a remedy usually depends on whether the mortgagee wants his capital or the interest. Where he wants his capital and seeks to put an end to the security, he commonly opts for either action for enforcement of covenant to repay, sale of the security or foreclosure. Whereas where he is concerned with the interest, he takes to possession of the property or appoints a receiver.⁹⁶ Also, an order for specific performance and foreclosure are more suited to an equitable mortgagee while the others are applicable to a legal mortgagee.⁹⁷ The remedies at the disposal of the mortgagee will be considered *seriatim*.

3.1.1 Action to recover mortgage sum and interest

Upon failure of the mortgagor to pay by the legal due date, the mortgagee has the right of action to recover the mortgage sum. In equity, a mortgage is a debt with an obligation on the part of the mortgagor to repay.⁹⁸ The mortgagee may institute an action in court against the mortgagor to claim the principal sum advanced to the mortgagee and the interest that has accrued on it. This remedy is common where the mortgage instrument does not confer an express power of sale on the mortgagee (although a legal mortgage does not need to contain an express power of sale before such power of sale is exercised).⁹⁹

In order to enforce this remedy, the mortgaged property must be in existence and the mortgagee must be in a position to reconvey same. Where the mortgagee has parted with the property he cannot enforce the covenant to repay.¹⁰⁰ After the expiration of twelve years from the date when

⁹⁶ Henchman, A. P., 'Remedies of the Secured Creditor' (delivered February 1972 at Annual Summer School, Law School of the University of Western Australia) <<http://www.austlii.edu.au/au/journals/UWALawRw/1971/2.pdf>> accessed 7 January 2015.

⁹⁷ Osamolu S.A, Oduwale O.T, Oba C.O. *Real Property Law and Conveyancing Practice in Nigeria*, (Abuja: Lawlords Publications, 2008) 278.

⁹⁸ *Sutton v Sutton* (1882) 22 CH.D 511.

⁹⁹ Y.Y. D. Dadem, *Property Law Practice in Nigeria*, (Jos-Nigeria: Jos University Press Limited, 2009) 144.

¹⁰⁰ Also, the mortgagee cannot enforce this covenant after foreclosure, except the property remains intact, but he opens the foreclosure proceedings thereby - Chigozie Nwagbara, 'Enforcement of Mortgage Security in Nigeria' (2014)

the right to recover the money accrued, the mortgagee cannot enforce a covenant to repay. The principal sum secured by the mortgage is also irrecoverable after the expiration of this period.¹⁰¹

3.1.2 Taking Possession of the security

A legal mortgagee has the right to take possession of the mortgaged property. Possession enables the mortgagee access in ensuring that the mortgage security does not deteriorate. This ultimately protects his interest upon realization of the security. The right to take possession is immediate and not dependent upon the default of the mortgagor in the payment of the amount.¹⁰² The power of a mortgagee to take possession of land without a court order is limited to legal mortgages and charges. An equitable mortgagee or chargee needs a court order.¹⁰³ This may be attributed to the fact that an equitable mortgagee has no legal title entitling him to possession and cannot ask lessees in possession to pay rent to him.¹⁰⁴

In opting to take possession of the property, the mortgagee is bound to account strictly to the mortgagor and any subsequent secured lender not only for actual receipts, but for what they should have received from a proper management of the property, and must also take reasonable care of

Volume 2 No.2 Global Journal of Politics and Law Research <<http://www.eajournals.org/wp-content/uploads/Enforcement-of-Mortgage-Security-in-Nigeria.pdf>> accessed 18 August 2014.

¹⁰¹ Ibid. Also stated in section 29 and 30 of the Limitation Law (Cap L67, Laws of Lagos State, 2003).

¹⁰² Section 19 (1) (iii) Conveyancing Act 1881 and Section 123 Property and Conveyancing Law 1959. In *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* (1957) Ch 317 at 320, it was stated to the effect that the mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the mortgage, express or by implication, whereby he has contracted out of that right.

¹⁰³ Richard Clark, Burges Salmon LLP & Neil Levy, Guildhall Chambers: 'When Processes Collide: Banks, Receivers, Administrators & Liquidators' <http://www.guildhallchambers.co.uk/files/When_processes_collide_RichardClark_&Neil_Levy_May2012.pdf> accessed 6 September 2014. Although it has been opined that an equitable mortgagee may have the right to possession if the mortgage deed says so: Fisher & Lightwood's Law of Mortgage, 13th ed (2010) para 29.8. in 'When Processes Collide : Banks, Receivers, Administrators & Liquidators'

¹⁰⁴ Chigozie Nwagbara, 'Enforcement of Mortgage Security in Nigeria' (2014) Volume 2 No.2 Global Journal of Politics and Law Research <<http://www.eajournals.org/wp-content/uploads/Enforcement-of-Mortgage-Security-in-Nigeria.pdf>> accessed 18 August 2014.

the property.¹⁰⁵ This caveat may be attributed to the reason why in practice mortgagees do not take possession of the property unless there is a default by the mortgagor.

Where the mortgagor is in possession of the mortgaged property, he is at the pleasure of the mortgagee who may at any time treat him as a trespasser.¹⁰⁶ However, where a mortgagee has been in possession of the mortgaged property for a period of 16 years from the date the right of the action first arose, the mortgagor's right to redeem is lost, and the property becomes vested in the mortgagee. The acknowledgement of the title of the Mortgagor or his equity of redemption, or the acceptance of any payment as regards the mortgage debt makes the time prescribed start to run afresh.¹⁰⁷

3.1.3 Appointing a receiver

In *Adetona & anor. V. Zenith International Bank Limited*¹⁰⁸ a receiver was defined as a person appointed by the court for the purpose of preserving the property of a debtor pending an action against him or applying the property in satisfaction of a creditor's claim whenever there is danger that in the absence of such appointment, the property will be lost, removed or injured. Receivership under a power in a mortgage is usually an out of court procedure available when the mortgagee's security has become enforceable. The courts also have the power to appoint receivers to assist

¹⁰⁵ Field Fisher Waterhouse 'Security over land' (June 2011) <www.fieldfisher.com/> accessed 28 December 2014.

¹⁰⁶ Imhanobe, S.O. *Legal Drafting & Conveyancing (with Precedents)* (3rd edition, Temple Legal Consult, Abuja, 2010) 567.

¹⁰⁷ Chigozie Nwagbara, 'Enforcement of Mortgage Security in Nigeria' (2014) Volume 2 No.2 Global Journal of Politics and Law Research <<http://www.eajournals.org/wp-content/uploads/Enforcement-of-Mortgage-Security-in-Nigeria.pdf>> accessed 18 August 2014.

¹⁰⁸ (2008) ALL FWLR (Part 440) 796.

enforcement. In a bid to avoid the responsibilities imposed by taking possession of the security, a receiver may be appointed while achieving substantially the same result.¹⁰⁹

The rights, duties and powers of a receiver are regulated by **Section 24(3), (6)-(7) of the Conveyancing Act (1881)** and **Section 131(3), (6)-(7) of the Property and Conveyancing Law (1959)** as follows:¹¹⁰

- the receiver shall have the power to demand and recover all the income of the property of which he is appointed receiver;
- he shall be entitled to remuneration out of the money received by him to pay taxes, rates and other outgoings affecting the mortgaged property;
- to pay interest accruing in respect of any principal money due under the mortgage;
- to pay the residue of the money received by him to the person who is entitled to receive the income of the mortgaged property.

¹⁰⁹ Robert Megarry, William Wade, Charles Harpum, Stuart Bridge, Martin J. Dixon, *Megarry & Wade: The Law of Real Property* (8th Edition, United Kingdom: Sweet & Maxwell, 2012) 871.

¹¹⁰ Where a company is the mortgagor, **Part XIV of the Companies and Allied Matters Act Cap. C20 LFN 2004** provides for the appointment of receivers and managers. **Section 388** states to the effect that where an application is made to the court to appoint a receiver on behalf of the debenture holder or other creditors of a company which is being wound up by the court, an official receiver may be appointed. **Section 389** provides to the effect that the court may, on the application of a person interested, appoint a receiver or a receiver and manager of the property or undertaking of a company if: the principal money borrowed by the company or the interest is in arrears, the security or property of the company is in jeopardy. A receiver or manager of any property or undertaking of a company appointed by the court shall be deemed to be an officer of the court and not of the company and shall act in accordance with the directions and instructions of the court. **Section 390** provides for receivers and managers appointed out of court. **Section 390(1)** states that such receiver or manager shall be deemed to be an agent of the person or persons on whose behalf he is appointed and, if appointed manager of the whole or any part of the undertaking of a company, he shall be deemed to stand in a fiduciary relationship to the company and observe the utmost good faith towards it in any transaction with it or on its behalf. **Section 393** provides for the duties, powers, etc, of receivers and managers. To this effect, a receiver of any property of a company shall, subject to the rights of prior incumbrancers, take possession of and protect the property, receive the rents and profits and discharge all out-goings in respect thereof and realize the security for the benefit of those on whose behalf he is appointed. He shall manage the whole or any part of the undertaking of a company with a view to the beneficial realization of the security of those on whose behalf he is appointed.

This remedy is available to both legal and equitable mortgagee. The legal mortgagee may appoint a receiver where he cannot go into physical possession for the same reason as he goes into possession himself such as where the security is in danger of being squandered by the mortgagor. It may also be that being in urgent need of his capital, he is anxious to divert the profits and apply them to the discharge of the mortgage debt. The legal mortgagee may also appoint a receiver where the mortgagor defaults to pay.¹¹¹ For the equitable mortgagee, the remedy is especially reserved since the mortgagee has no legal estate and cannot *ipso facto* go into physical possession and enter into receipt of rents and profits directly. Consequently, what an equitable mortgagee cannot do directly by entering into physical possession, he can do indirectly by appointing a receiver. Where the mortgage is an equitable mortgage created by deed the deed should provide for the power to appoint a receiver. However, where there is no clause on the appointment of a receiver, the mortgagee may apply to court for one to be appointed. Here, his duties may be regulated by the order of court appointing him and he is personally liable for his acts. Therefore, he must give security before assuming his office and must act in good faith. Where he colludes to undervalue the property and have it sold at gross undervalue, the sale will be set aside as evidence of bad faith.¹¹²

¹¹¹ Section 19 (1) Conveyancing Act 1881, Section 123 Property and Conveyancing Law 1959. This was reiterated in *Awojugbagbe v Chinukwe* (1995) 4 NWLR (Part 390).

¹¹² *West African Breweries Ltd. v Savannah Ventures Ltd.* (2002) 5 SCNJ 269.

3.1.4 Sale of the security

The remedy of sale has been described as the most potent of all the mortgagee's remedies.¹¹³ It has also been described as the most effortless manner employed in the realization of security. It is central to legal mortgages created by deed and is predicated on¹¹⁴:

---the mortgage being by deed.

---the mortgage money having become due and payable; and

---the absence of a contrary intention in the mortgage deed.

These three conditions are conjunctive and not disjunctive.

The right of the mortgagee to sell the property can only be employed if the power of sale **arises** and **becomes exercisable**¹¹⁵. In *Nig. Advertising Services Ltd. V. UBA Plc*¹¹⁶ it was stated that a mortgagee's power of sale becomes exercisable if it has arisen and once it has so arisen the title of a subsequent purchaser will not be affected by its improper or irregular exercise and the sale will be regarded as valid. The power of sale arises where the mortgage debt is not paid at any time fixed for payment. The mortgagee has no power to sell the mortgaged property until the legal date of redemption has passed or the mortgagor has breached a covenant in the mortgage. For instance, the covenant to pay interest or principal promptly may warrant a sale. The fact that there is power to sell when any instalment of the mortgage money has become due in the manner provided for in

¹¹³ Chianu E. *Law of Securities for Bank Advances (Mortgage of Land)*, (Edo: Ambik Press, 2000) 115.

¹¹⁴ Section 19 (1) Conveyancing Act 1881, Section 123 (1) Property and Conveyancing Law 1959.

¹¹⁵ In *Babatunde v B.O.N. Ltd.* (2011) 18 NWLR (Pt. 1279) 738 S.C it was held that before a mortgagee can pass a good title to a purchaser free from the equity of redemption, the right to exercise the power of sale under a mortgage must have arisen, the mortgage debt must have fallen due. Hence, once the precondition of notice of sale is given to the mortgagor by the mortgagee or his agent, preceded by a notice of demand of repayment of money lent to the mortgagor and the mortgagee proceeds to sell in good faith, the subsequent purchaser in good faith gets a good title and a court will not intervene in the sale only because the sale did not meet with the satisfaction of the mortgagor.

¹¹⁶ (1999) 8 NWLR (Part 616) 546.

the mortgage deed was highlighted in *Payne v. Cardiff Rural District Council*¹¹⁷ to the effect that the phrase “when the mortgage money has become due” cannot mean only when the whole debt is due; it includes when part only is due in situations where the debt is repayable by instalments.¹¹⁸

The existence of any of these three following conditions makes the power of sale to become exercisable¹¹⁹:

- Notice requiring payment of the mortgage money has been served on the mortgagor or on several mortgagors and there is default of payment for three months after such service; or
- Some interest under the mortgage is in arrears and unpaid for two months after becoming due;
- There has been a breach of some provisions contained in the mortgage deed or under the provisions of the Conveyancing Act or the Property and Conveyancing Law.¹²⁰

These requirements were interpreted in *B.O.N. v. Aliyu*¹²¹ to the effect that compliance with them is mandatory and not advisory. Therefore, any sale of any mortgage property without the requisite notice is invalid *ab initio* and cannot convey any title to a subsequent purchaser. It should be noted that by the provisions of sections 19 (2) of the CA and 123 (2) PCL, any of these requirements may be excluded either altogether or be varied by agreement of the parties.¹²² However, certain provisions that exist not to protect the parties but the public may not be waived. In *Okonkwo v.*

¹¹⁷ (1932) 1 KB 241. Also reflected in *S.O.N. Okafor & Sons Ltd v Nigeria Housing Devt Society Ltd.* (1972) ECSR (Part 1) 349.

¹¹⁸ Reiterated in Dadem, Y.Y.D. *Property Law Practice in Nigeria*, (Jos-Nigeria: Jos University Press Limited, 2009) 145 that where the mortgage debt is payable by instalments, the power of sale arises as soon as any instalment is in arrears.

¹¹⁹ Section 20 Conveyancing Act 1881, section 125 Property and Conveyancing Law 1959.

¹²⁰ Although some provisions of the laws are exempted and the parties may decide to exclude them - Section 19(2) Conveyancing Act 1881, Section 123 (2) Property and Conveyancing Law 1959.

¹²¹ (1999) 7 NWLR (Part 612) 622 at 634.

¹²² *WEMA Bank Plc v Abiodun* (2006) 9 NWLR (Part 984) 1. In *Bank of the North v. Babatunde* it was held to the effect that where in a mortgage deed the parties agree to exclude certain provisions of the law to enable the mortgagee exercise his power of sale, this is not prohibited by law or against public policy.

*Cooperative and Commerce Bank (Nig.) Plc*¹²³ it was held that the provisions of section 19 of the Auctioneers Law CAP 12 Laws of Eastern Nigeria still applicable in some states cannot be waived since it does not exist to protect the parties, but the public.

Based on the foregoing, the mortgagee must wait for the power of sale to arise and also to become exercisable before he sells. The effect of this is that a purchaser who purchases a property before the power of sale arises will not get a good title. But a purchaser who buys without the power becoming exercisable will have a good title notwithstanding this irregularity; the remedy of the mortgagor will only lie in damages against the mortgagee.

Sale requiring a Court Order: In *Federal Administrator General v. Cardoso*¹²⁴ it was stated obiter that a mortgagee may sue for foreclosure or he may exercise his right of sale of the property, in the two latter cases by action at law. However, this seems contrary to Section 19(1) Conveyancing Act 1881 and 123(1) of the Property and Conveyancing Law 1959 that provide to the effect that a mortgagee has the power to sell the property so long as the mortgage is by deed. Therefore, even where the mortgage is equitable, in so far as the instrument has a seal on it, the mortgagee has power to sell without recourse to court. Whereas, for equitable mortgage not made by deed, a court order is required before the mortgagee can sell.¹²⁵ In *Adjei v. Dabanka*¹²⁶ the mortgage was by deposit of title deeds coupled with an informal document. It was held to the effect that it was essential for the mortgagee to have come to the court to obtain an order of foreclosure before a sale of the mortgaged property could have been legally effected. To this effect, the sale was held invalid as it failed to comply with this. The rationale to this has been attributed to the fact

¹²³ (2003) FWLR (Part 154) 457.

¹²⁴ (1973) NSCC 577, 580

¹²⁵ Chianu E. *Law of Securities for Bank Advances (Mortgage of Land)*, (Edo: Ambik Press, 2000) 119.

¹²⁶ (1930) 1 WACA 63, 67.

that an equitable mortgagee has nothing more than an equitable interest and he would not have the power to transfer title save for the statutory provisions aforementioned to that effect. This is based on the principle of *Nemo Dat Quod Non Habet*. The foregoing is subject to the express stipulation in the mortgage contract. Hence, where an equitable mortgage evidenced in writing confers a power to sell on the mortgagee, the dicta in *Adjei v. Dabanka* would not apply.¹²⁷

It is pertinent to note that in exercising his power of sale, the mortgagee is not a trustee of the mortgagor of the power of sale. Rather, the power is given to the mortgagee for his own benefit to enable him realize his security.¹²⁸ The mortgagee's motive for selling is immaterial even if it means to spite the mortgagor or it is unfavorable to the mortgagor. The decision of the mortgagee is not limited by the fact that the exercise or non-exercise of the power of sale would cause loss or damage to the mortgagor or that the timing of sale is advantageous. The court has no right to inquire into the motives of a mortgagee for exercising his power of sale since the power is vested on the mortgagee for his own interest. However, he cannot sell to himself; not directly or through his agent. He needs to act honestly and in good faith.¹²⁹

Where the sale is completed, the mortgagee should use the amount to satisfy the mortgagor's indebtedness to him. If there is another mortgage he should use the balance to settle the other mortgage else he must return the balance of the sale to the mortgagor.¹³⁰ The mortgagee can sue

¹²⁷ Chianu E. *Law of Securities for Bank Advances (Mortgage of Land)*, (Edo: Ambik Press, 2000) 120.

¹²⁸ Dadem, Y.Y.D. *Property Law Practice in Nigeria*, (Jos-Nigeria: Jos University Press Limited, 2009) 147. In *Salami v Wema Bank (Nig.) Plc* (2010) 6 NWLR (Part 1190) 341 C.A. it was stated that the interest of the mortgagee is paramount and as long as the sale is conducted *bona fide* a mortgagor has no legal basis to complain in respect of, or about a low price.

¹²⁹ *Eka-Eteh v NHDS Ltd.* (1973) 6SC 183, *W.A.B Ltd v Savannah Ventures Ltd* (2002) 10 NWLR (Part 775) S.C. 401. A sale may be set aside where the mortgagee fails to act in good faith. This is one of the remedies available to the mortgagor (see Chapter 4, FN 164) Also held in *Abdulrahman v Oduneye* (2009) 17 NWLR (Part 1170) 220 C.A. that the only obligation incumbent on a mortgagee selling under and in pursuance of a power of sale in the mortgage deed is that he should act in good faith.

¹³⁰ *Eka-Eteh v NHDS Ltd.* (1973) 6SC 183.

the mortgagor in court to recover the balance where the proceeds of the sale does not satisfy the principal and the interest. This is because of the mortgagor's primary undertaking to pay the principal and interest. The mortgagor can also sue the mortgagee for the surplus where he refuses to give it. The mortgage proceeds of sale of a mortgaged property must be applied in the following order: Pay up all mortgages having priority, Pay commission to the auctioneer and all other costs of sale, Pay up outstanding interests, Pay up outstanding mortgage sum; and Pay balance to person entitled to equity of redemption.¹³¹

The only way a mortgagor can stop the exercise of a power of sale is for him to pay the money in full. Where the mortgagor has commenced an action in court for instance a redemption action, the court can only stop sale where the money is paid into court.¹³²

3.1.5 Foreclosure

Upon giving the mortgagor a reasonable time within which to redeem and he still refuses, neglects or is unable to do so, the mortgagee may institute an action for foreclosure against the mortgagor. The judgment of foreclosure by a Court makes the mortgagee to become the absolute owner of the mortgaged property free from all rights of redemption.¹³³ It is an order of court by which the equity of redemption of the mortgagor and all persons claiming through him including subsequent encumbrances are extinguished in order to vest the mortgaged property absolutely in the mortgagee. The equitable right to redeem is also destroyed. In foreclosure, equity by equity destroys the equitable right to redeem.¹³⁴ The equitable right to redeem is the right granted by mortgagor to still recover his security by paying the money under the mortgage although the time

¹³¹ Section 21 (3) Conveyancing Act 1881 reflected in Section 127 Property and Conveyancing Law 1959.

¹³² *NHDS v Mumuni* (1977) 2 SC 57.

¹³³ *Silberschildt v Schiott* (1814) 3 Ves. & B. 45.

¹³⁴ Dadem, Y.Y.D. *Property Law Practice in Nigeria*, (Jos-Nigeria: Jos University Press Limited, 2009) 144.

fixed for the payment of that money has passed and even if this is against the expressed intention of the parties. The mortgagee is entitled to all the proceeds following a sale. It has no duty to provide the surplus to the mortgagor.

This is a common remedy for equitable mortgagees since a legal mortgagee would rather exercise the power to sell the property in the event of a default. It is the most appropriate remedy for an equitable mortgagee whose mortgage was not created by mere charge.¹³⁵

The court may grant an order for judicial sale as an alternative to foreclosure. In this situation, the court would issue a certificate of purchase. This is a certificate usually issued to purchasers in case of a judicial sale. In certain jurisdictions, a certificate of purchase is an instrument that is required to be registered and failure to register it will make it inadmissible in evidence.¹³⁶ Where the land is subject to a customary right of occupancy, the purchaser would have to apply for the consent of the governor to have the legal title of the property vested in him.¹³⁷

An order of foreclosure is usually granted in stages: first *nisi* (unless) and then secondly, *absolute*. At the *nisi* stage, redemption is still possible for a period of six months and then where the mortgagor still fails to redeem, then upon another application by mortgagee, a decree absolute would be granted. But the mortgagee cannot re-open the foreclosure where the mortgagee sells the mortgaged property after foreclosure. He cannot sue the mortgagor even if the proceed of sale is not sufficient to discharge the outstanding mortgage sum and interest.¹³⁸

¹³⁵ *Ogundaini v Araba* L.R.N. 280. Although the remedy is also open to a legal mortgagee.

¹³⁶ Section 2 Land Instrument Registration law Ogun State; section 2 Land Instrument Registration Law of Kaduna State.

¹³⁷ Section 21 (a) Land Use Act, 1978.

¹³⁸ *Lockhart v Hardy* (1946) 9 Beav. 349 in Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007).

3.1.6 Action for order of specific performance

This is an equitable remedy available to an equitable mortgagee. By a decree of specific performance, the court orders a party to a contract to perform his contractual obligations.¹³⁹ It is premised on the doctrine of part performance. Therefore in order to be entitled to it, one must be able to show a definite act on his part that was done relying on the representation of the other party. For instance, the mortgagee usually resorts to this where the mortgagor fails, refuses or neglects to complete the documentation for the mortgage even after receiving the mortgage sum.¹⁴⁰

Where the mortgagor fails to discharge the mortgage sum and interest on the legal due date, the mortgagee will usually want to sell the security. But he cannot sell the security or transfer legal interest as he has no legal estate to transfer to the purchaser except by the order of court; or where the mortgage is by deed and is accompanied with any of the two remedial devices of declaration of trust or power of attorney. Usually, the court would make an order for specific performance by which the mortgagor is mandated to execute a legal mortgage in favor of the mortgagee. Upon the refusal or failure of the mortgagor to do this, the court can and usually mandates an officer of the court to execute the legal mortgage. Such officer is deemed to be the agent of the mortgagor. Upon the receipt of the legal mortgage, the mortgagee can transfer legal interest to a purchaser and thereby extinguish the title of the mortgagor. In *Ogundiani v. Araba & Or*¹⁴¹ the Court of Appeal held *inter alia* that: equitable mortgage, by agreement to execute a legal mortgage can be enforced by order of specific performance. If successful, the mortgagee obtains legal estate and can pursue

¹³⁹ *Mustapha v Abubakar* (2011) 3 NWLR (Pt 1233) 123 C.A.

¹⁴⁰ Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 280.

¹⁴¹ (1978) NSCC Volume 11. 334.

all the statutory remedies open to a legal mortgagee. It should be noted that an order of specific performance, like other equitable remedies, is only given as a matter of discretion¹⁴²

3.2 REMEDIES AVAILABLE TO A MORTGAGOR UNDER A MORTGAGE TRANSACTION

Although the above methods protect the mortgagee through the enforcement of the mortgage security, these methods are not without certain checks guaranteed in equity. They are granted to protect the mortgagor's interest and prevent arbitrary exercise by the mortgagee. They are:

3.2.1 The equity of redemption

It is important to consider the equity of redemption of the mortgagor as the foregoing represent circumstances where this right may be interfered with or even destroyed. If the assertion that "once a mortgage, always a mortgage"¹⁴³ is to be discountenanced and negated, then it is pertinent to consider its meaning. The equity of redemption is that right that is vested in the mortgagor with the effect that he is entitled to recover his property upon repayment of the mortgage debt. It is his subsisting interest after mortgaging a land and surrendering the certificate or title document. *A right of redemption is a necessary element in a mortgage transaction and where the contractual right of redemption is illusory, equity will grant relief by allowing redemption.*¹⁴⁴ The equity of

¹⁴² *Mustapha v Abubakar* (2011) 3 NWLR (Pt 1233) 123 C.A.

¹⁴³ In *Owoniboy Technical Services Ltd v Union Bank of Nigeria Ltd* (2003) SCNQR 58. It was stated in this case that "once a mortgage, always a mortgage, there must be no clog on the equity of redemption."

¹⁴⁴ *Knightsbridge Estate Ltd v Byrne* (1939) 1 Ch. 441 at 456. Also highlighted in *Rafuka v Kurfi* (1996) 6 NWLR (Part 453) 235.

redemption can be exercised either by the mortgagor or a person having any interest in the mortgaged property or one liable to pay the mortgage sum.¹⁴⁵

From its earliest times, Equity has protected mortgagors from unconscionable conduct by voiding any term that are construed as oppressive.¹⁴⁶ So the courts will not give effect to any clause in a mortgage instrument which seeks unduly to restrict the right to redeem the mortgaged property or prevent prompt redemption of the mortgaged property. Therefore, any attempt by the mortgagee to clog the mortgagor's right of redemption will be challenged by the court. It may even be deemed unreasonable and may consequently preclude the parties from the contract. The equity of redemption is so important that the courts will have recourse not only to the mortgage deed but also to other extraneous factors like the bargaining power of the mortgagor, the length of time for which the contractual right to redeem is postponed or whether the mortgagor received independent advice.¹⁴⁷ Consequently, a stipulation in a mortgage transaction which gives the mortgagee the right to buy mortgage property would be void as repugnant to the right of redemption of the mortgagor.¹⁴⁸

The earlier view on equity of redemption was that the equity of redemption of the mortgagor may be lost, and the property subsequently lost to him as soon as he defaults in paying up the due debt on the agreed date of the contract.¹⁴⁹ But this position has become a misnomer because the position taken over a long time by the court of equity is that no form of default in payment on the agreed

¹⁴⁵ Imhanobe, S.O. *Legal Drafting & Conveyancing (with Precedents)* (3rd edition, Abuja: Temple Legal Consult, 2010) 570.

¹⁴⁶ *Kreglinger v New Pantagonia Meat and Cold Storage Co. Ltd.* (1914) A.C. 25.

¹⁴⁷ *Ibid* 571.

¹⁴⁸ *Samuel v Jarrah Timber and Wood Paving Corps.* (1904) A.C. 323 H.L.K., *Browne v Tyan* (1901) 21 R. 653, *Lewis v Frank Love Ltd* (1961) ALL E.R. 446, *London and Globe finance Corps Ltd v Montgomery* (1902) 18 T.L.R. 661; *Reeve v Lisle* (1902) A.C. 461 H.L.

¹⁴⁹ Olulana, O.J.A. *The Law and Practice of Banking, Collateral Securities and Mortgages*, (Lagos: Diversities Enterprises Publishers, 2000) 271.

date will cause the land to be forfeited and consequently the title deed to the mortgagor, the right of equity of redeeming it, subsists until the court bars the right by a judgment of foreclosure, or until the right has been lost by the terms of the statute of limitation. The right could also be lost by the dismissal of a redemption action by the court, or a valid sale under the mortgagee's powers, or when the mortgagor releases the equity of redemption to another. This explains the equitable right to redeem.

3.2.2 The equitable right to redeem

A right to redeem in equity arises as soon as the mortgage is created to protect the mortgagor when his contractual right to redeem at common law is lost upon failure to repay the loan on the date fixed for repayment under the mortgage agreement. Where the mortgage debt remains unpaid after the date fixed for repayment under the contract, the mortgagor loses his common law right to redeem the mortgage but has the equitable right to redeem.¹⁵⁰ The equitable right to redeem is the right of the mortgagor to redeem the mortgaged property at the expiration of the contractual date for redemption i.e. the legal due date.¹⁵¹

Both the equity of redemption and equitable right to redeem have one thing in common: they do not last *ad infinitum*.¹⁵² The mortgagor is entitled under the contract contained in the mortgage deed to redeem the property subject of security by paying to the mortgagee all that is due in respect of principal and interest.¹⁵³ Provided that the mortgagor has not lost the right to redeem the security in circumstances under which mortgagor may lose right to redeem: sale of mortgaged property, appointment of receiver, action for foreclosure,¹⁵⁴ and statute of limitation. Where the mortgagee

¹⁵⁰ Smith I.O. *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications Limited, 2006) 39.

¹⁵¹ *Brown v Cole* (1845) 14 Sim. 427

¹⁵² Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 283.

¹⁵³ Section 26 Conveyancing Act 1881, Section 137(2) Property and Conveyancing Law Cap 100 LWN.

¹⁵⁴ Smith I.O. *Nigerian Law of Secured Credit*, (Lagos: Ecowatch Publications Limited, 2006) 70.

is in possession and the mortgagor fails or neglects to redeem the mortgage for a period of sixteen years under the limitation law, his equity of redemption becomes extinguished.¹⁵⁵

3.2.3 Injunction against a Mortgagee's exercise of power of sale

Where the mortgagee acts honestly and in good faith, nothing can be done by the court. However, there are certain circumstances in which an injunction may be sought and the exercise of the power of sale can be set aside:

- Where there is some corruption or collusion in respect of the sale by the mortgagee to amount to fraud.
- Where the sale is at such a low value that it raises an inference that there is fraud in the sale.
- Where there is evidence that the money has been paid in full.
- Where the mortgagee sells to itself or to its privy.

An allegation of fraud must be specifically and clearly pleaded and proven in evidence. The mortgagee is only required by law to obtain a proper price and not the best price for a property. Sale at undervalue is not necessarily a measure of the fraud of the mortgagee to be able to vitiate the mortgagee's power of sale, it must be shown that the sale was made at a fraudulent or gross undervalue. In *Ihekwoaba v. ACB*¹⁵⁶ the property for sale was valued at the sum of N194, 000.00. It was sold ten years later at the sum of N115, 000.00. The Court of Appeal held that in the absence of evidence that the property had depreciated, the sale was set aside as evidence of fraud. The Supreme Court set the decision aside and held that where a party alleges fraud in a sale or property

¹⁵⁵ Section 28 Limitation Law (Cap. L67, Laws of Lagos State, 2003) Page 304. Section 13 for old western region is 12 years and Section 28, Real Property Limitation Act, 1835 is 20 years for northern and eastern states.

¹⁵⁶ (1998) 10 NWLR (Part 571) 590.

at a very low price, such party must proffer evidence against the sale. The standard of proof will be proof beyond reasonable doubt.

Also, where the mortgage deed expresses a contrary intention against the power of sale, this can be upheld against the mortgagee that seeks to sell.¹⁵⁷

In summary, this chapter enlightens readers on the methods available to the mortgagee in enforcing the mortgage security. This is especially necessary as it has been asserted that today secured creditors do not avail themselves of the many remedies available to them.¹⁵⁸ This may be due to ignorance as to the applicable remedy for each situation.

¹⁵⁷ Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 178.

¹⁵⁸ Henchman, A. P., 'Remedies of the Secured Creditor' (delivered February 1972 at Annual Summer School, Law School of the University of Western Australia) <<http://www.austlii.edu.au/au/journals/UWALawRw/1971/2.pdf>> accessed 7 January 2015.

CHAPTER FOUR: THE ENFORCEMENT OF MORTGAGE SECURITY IN THE NIGERIAN FINANCIAL SYSTEM

Following the adoption of the National Housing Policy in 1990, the Federal Mortgage Bank of Nigeria (FMBN) is empowered to license and regulate primary mortgage institutions in Nigeria and act as the apex regulatory body for the mortgage finance industry.¹⁵⁹ The mortgage industry in Nigeria is faced with certain daunting challenges in the enforcement of mortgage security. Problems encountered by mortgagees in the enforcement of mortgage security result in a significant fall in the desire to lend thus negatively affecting housing delivery in Nigeria. In order to achieve sustainable growth in the Nigerian banking system, it is pertinent to address the constraints in the enforcement of mortgage security in Nigeria.

4.0 CHALLENGES TO THE ENFORCEMENT OF MORTGAGE SECURITY IN NIGERIA

4.1 Challenges posed by the mortgagee's remedies: One major challenge to the enforcement of mortgage security is the fact that borrowers seek injunctions at the courts to block enforcement action.¹⁶⁰ This cuts across all the remedies. It is not uncommon for the mortgagor's solicitor to file various preliminary injunctions and interlocutory applications all in a bid to frustrate enforcement of the mortgage security.¹⁶¹

¹⁵⁹ <<http://www.nigeriaconsulate.org.hk/Common/Reader/Channel/ShowPage.jsp?Cid=5&Pid=4&Version=0&Chars=iso-8859-1&page=0>> accessed 3 January 2015.

Section 5 of the Federal Mortgage Bank of Nigeria Act (Cap. F16 Laws of the Federation of Nigeria 2004) provides to the effect that it shall be the function of the mortgage Bank to supervise and control the activities of mortgage institutions in Nigeria. The FMBN is under the control of the Central Bank of Nigeria (CBN) which is the apex regulatory authority of the financial system in Nigeria.

¹⁶⁰ Loan Market Association. < <http://www.lma.eu.com/pages.aspx?p=451> > accessed 3rd January 2015.

¹⁶¹ *Intercity Bank Plc v F&F.F. (Nig) Ltd* (2001) 17 NWLR (Part 742) P. 342 was an appeal against the **interlocutory injunction** granted by the trial court restraining the appellant from exercising its power of sale under a mortgage deed over the 2nd respondent's property. The Court of appeal in allowing the appeal stated obiter that the court will not intervene or restrain the mortgagee from exercising his right of sale of the mortgaged property which is

Action to recover mortgage sum and interest: Henchman opines that this is probably the last resort of a mortgagee.¹⁶² This is because unless the mortgagee is satisfied that the mortgagor is a person or company of substantial means, there is little point in bringing an action on the personal covenant before the mortgagee's power of sale is exercised. Such efforts to enforce this remedy may prove futile. It is better to first sell and then bring an action on the personal covenant for any deficit.¹⁶³

Sale: This remedy has been described as the most litigated aspect of the mortgagor and mortgagee relationship.¹⁶⁴ Allegations of fraud in the conduct of a sale constitute a major challenge to the exercise of this remedy. If a mortgagee is alleged to have acted in bad faith, an injunction may be sought by the mortgagor to prevent the mortgagee from proceeding with the sale.¹⁶⁵ This delays proceedings and reduces the pace of enforcement.

Another challenge is evident where the interest in a mortgaged property is a customary right of occupancy; the power of sale may not be exercised without the consent of the Governor if the sale

the only certain shield and he should be allowed to sell. Similarly, this was the case in *Afriland Plc v Adeniji Adele* (2000) 15 W.R.N. 16; *ACIB v Awogboro* (1991) 2 NWLR (Part 176) 711; *Cornelius Ltd v Ezenwa* (1996) 1 R.M. L.R (Part 2) p. 42.

¹⁶² Henchman, A. P., 'Remedies of the Secured Creditor' (delivered February 1972 at Annual Summer School, Law School of the University of Western Australia) <<http://www.austlii.edu.au/au/journals/UWALawRw/1971/2.pdf>> accessed 7 January 2015.

¹⁶³ Ibid.

¹⁶⁴ Mark Hilton and Jeanette Barbaro, 'Managing the Mortgagor and Mortgagee Relationship' (2009) 16 *Australian Law Journal* 204 in Joan Squelch, 'Mortgagee's power of sale and the duty to sell at market value' <<http://www.austlii.edu.au/au/journals/LegIssBus/2009/6.pdf>> accessed 7 January 2015.

¹⁶⁵ *Sablebrook P/L v Credit Union Australia Ltd* (2008) QSC 242 in Joan Squelch, 'Mortgagee's power of sale and the duty to sell at market value' <<http://www.austlii.edu.au/au/journals/LegIssBus/2009/6.pdf>> accessed 7 January 2015.

is by way of court order under the Sheriff and Civil Process Act.¹⁶⁶ This process is challenging as the procedure for seeking and obtaining Governor's consent is a herculean task.¹⁶⁷

Possession: According to Ananechi, the practical issue with enforcing security by this method is that the mortgagor may not allow the mortgagee to peacefully exercise this right.¹⁶⁸ Based on the fact that this is a non-judicial method, most mortgagors will resist and virtually frustrate attempts by the mortgagee to take possession of the mortgaged property, without a court order compelling the mortgagor to allow the mortgagee to enter into possession.

Again, mortgagees in possession have to account strictly to the mortgagor for the rent accruing from the property. In opting to take possession of the property, the mortgagee is bound to account strictly to the mortgagor and any subsequent secured lender not only for actual receipts, but for what they should have received from a proper management of the property, and must also take reasonable care of the property.¹⁶⁹ The mortgagee in possession is liable to effect repairs on the property.¹⁷⁰

Receivership: The challenges inherent in this remedy are reflected in its disadvantages which are: the receiver is remunerated out of the income received from the mortgaged property; the mortgagee

¹⁶⁶ Section 21 (a) and (b) Land Use Act, 1978 CAP 22 LFN 1990. But there is no requirement of consent if the sale is out of court pursuant to express or statutory powers or where an equitable mortgagee applies for a judicial power of sale - Augustine Evangel Esq., Malachi Elisha Brown, 'Mortgage, Pledge and Charge Transactions in Nigeria: Comparative/Distinctive Analysis and Legal Examination.' (2013) Volume 13, Issue 6 (Sep.-Oct. 2013), IOSR Journal of Business and Management (IOSR-JBM) pp 100-107. <www.iosrjournals.org> accessed 7 January 2015.

¹⁶⁷ See FN 177.

¹⁶⁸ Anyanechi, O., 'Bank finance and regulation. Multi-jurisdictional survey Nigeria. Enforcement of security interests in banking transactions.' <https://www.google.com.ng/search?q=Bank+finance+and+regulation.+Multi-jurisdictional+survey+Nigeria.+enforcement+of+security+interests&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&channel=fflb&gfe_rd=cr&ei=oqCsVK-yOIGA0AW-6YDwCA> accessed 7 January 2015.

¹⁶⁹ Field Fisher Waterhouse 'Security over land' (June 2011) <<http://www.fieldfisher.com/media/2457/Security-over-land.pdf>> accessed 28 December 2014.

¹⁷⁰ Although the cost of such repairs is from the rents and profits collected from the security-- Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 151.

while having control over the appointment of the receiver, has less control than when in possession; in practice, the mortgagee may have to agree to indemnify a receiver against some or all of his potential liability to the mortgagor.¹⁷¹

Foreclosure: The major challenge in the exercise of this remedy is that foreclosure processes are seen to be cumbersome and time-consuming. During the period between foreclosure orders *nisi* and *absolute*, proceedings are protracted.¹⁷² According to Pepple,¹⁷³ most players in the industry are of the view that foreclosure law is not helpful to the lender and weighs heavily against it. This gives latitude for borrowers to default in the repayment of their loans.

4.2 Legal/Regulatory/Legislative Challenges

Nigeria's mortgage laws need reform to bring them up to date with modern needs.¹⁷⁴ The Land Use Act 1978 has caused difficulties that may impede the exercise of certain remedies by the mortgagee. For instance in a sale, by virtue of the provisions of Section 21 and 22 of the Land Use Act, the responsibility to obtain consent to alienate a statutory right of occupancy is on the mortgagor who is the holder. The mortgagor may intentionally or negligently fail to do this. This

¹⁷¹ Tamsin Cox & Kester Lees, 'Mortgagees' Remedies in a Shaky Market.' <[http://www.falcon-chambers.co.uk/uploads/docs/section9/Motgagees%27 Remedies in a Shaky Market.pdf](http://www.falcon-chambers.co.uk/uploads/docs/section9/Motgagees%27%20Remedies%20in%20a%20Shaky%20Market.pdf)> accessed 7 January 2015.

¹⁷² Osibanjo, Y., 'Challenges of enforcement of Securities in Nigeria' <http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.justiceresearchinstitute.org%2Fassets%2FENFORCEMENT-OF-SECURITIES-CHALLENGES.pptx&ei=hPWYVKKpGcGyUd-AgegM&usg=AFQjCNFpGf3fD4JDWk-vVozFr2MFRM1GoA&sig2=I_8usNhZ6xB6lTCEoZM5xw&bvm=bv.83339334,d.d24> accessed: 7 January 2015.

¹⁷³ Ms. Ama Pepple, Former Minister of Lands, Housing and Urban Development at the Real Estate Lawyers Association of Nigeria (RELAN) 2013 Summit. <<http://thenationonlineng.net/new/adoke-others-see-mortgage-laws-reform/>> accessed 4 January 2015.

¹⁷⁴ Jibueze, J., 'Adoke, others seek mortgage laws reform The Nation' *The Nation* (25 June 2013) <<http://thenationonlineng.net/new/adoke-others-see-mortgage-laws-reform/>> accessed 4 January 2015. The Attorney-General of the Federation Mohammed Adoke (SAN), former dean Faculty of Law, UNILAG Prof. Imran Smith amongst others said the existing laws were old. This was at the Real Estate Lawyers Association of Nigeria (RELAN) 2013 Summit with the theme: Foreclosure Law and processes in relation to Mortgage security in Nigeria.

renders the mortgage void in law¹⁷⁵ where the mortgagor defaults and the mortgagee would not be able to exercise the power of sale.¹⁷⁶ This is aggravated by the herculean consent application process in Nigeria. Some states have turned the request for consent into a money making venture. This has caused unnecessary delay in the process of giving consent thereby slowing down land development.¹⁷⁷ In practice, obtaining Governor's consent for transactions takes about 61 days on average depending on the state where the land is located.¹⁷⁸ Ultimately, this affects the mortgagee seeking to enforce the security.¹⁷⁹ Obaseki, JSC., in the celebrated case of *Savannah Bank (Nig.) Ltd. v. Ajilo*¹⁸⁰ on this issue stated thus:

“The Land Use Act is bound to have a suffocating effect on the commercial life of the land and house owning class of society who use their properties to raise loans and advances from the banks. I have no doubt that it will take the whole working hours of a Governor to sign consent papers (without going halfway) if these clauses are to be implemented.”

Furthermore, Section 28 of the Land Use Act does not portray the right of occupancy as an adequate or efficient security for a mortgagee.¹⁸¹ Section 28 (1) provides to the effect that it shall be lawful for the Governor to revoke a right of occupancy for overriding public interest. The wide

¹⁷⁵ Section 26, Land Use Act 1978.

¹⁷⁶ LLM Class seminar UNILAG. ‘The mortgagee’s power of sale- problems and solutions’ <http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fsecuredcredit.files.wordpress.com%2F2011%2F02%2Fthe-mortgagee-grp-6seminar-paper.doc&ei=wfiyVPziEoTnUs2Pg4AI&usg=AFQjCNF5p--hEiNSVx3_128pMi4QeMZFAw&sig2=R1dMhnMStZgG2eCzYhdYkA&bvm=bv.83339334,d.d> accessed: 6 September 2014.

¹⁷⁷ Olanrewaju, D. ‘The fallacy of using power of attorney to avoid the consent provisions under the Land Use Act’ *Babcock University Socio-Legal Journal*. Volume 1, Number 2, (August 2012) 176.

¹⁷⁸ NMRC <<https://greymile.wordpress.com/tag/nmrc/>> accessed 3 January 2015.

¹⁷⁹ This is especially so because it is the Governor’s consent that vests a valid title on the mortgagee. *P.I.P. Ltd. v Trade Bank (Nig.) Plc* (2009) 13 NWLR (Pt. 1159) 577 C.A.

¹⁸⁰ (1989) NWLR (Part 97) 305 at 329.

¹⁸¹ Amodu, N.A., ‘Efficiency of Mortgage transactions under the Land Use Act: Myth or Reality’ <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843241> accessed 6 September, 2014.

range of instances covered by the overriding public interest in the revocation of a right of occupancy accounts for its inefficiency as security for a mortgagee.¹⁸² In addition to this, the definition of the term “holder” of a right of occupancy in the Land Use Act¹⁸³ renders the mortgagee incapable of laying claim to any compensation upon the revocation of the right of occupancy. This is due to the fact that once the right of occupancy is revoked, the security is gone and does not attach to the mortgagor’s interest in any changed form. Rather, the mortgagor may be entitled to compensation for the value of his unexhausted improvements on the land,¹⁸⁴ leaving the mortgagee without remedy.

The fact that the mere issuance of a certificate of occupancy to a person without title to a parcel of land acquires no right or interest which he did not have before ¹⁸⁵ further aggravates the mortgagee’s position. This occurs where the certificate of occupancy is set aside if it turns out that the holder had no right to the land or in favour of a pre-1978 conveyance or in favour of a deemed grantee of right of occupancy under section 34 of the Act.¹⁸⁶ The certificate raises a rebuttable

¹⁸² Section 28(2) and (3) state a range of possibilities that amount to overriding public interest to warrant a revocation of a statutory right of occupancy and a customary right of occupancy respectively. For example, the alienation by the occupier by assignment, mortgage, transfer of possession, sub-lease, or otherwise of any right of occupancy or part thereof contrary to the provisions of this Act or of any regulations made thereunder; the requirement of the land by the government of the state or by a local government in the state, in either case for public purposes within the state....

¹⁸³ Section 51 Land Use Act (LUA). It expressly excludes the mortgagee from its definition. “In relation to a right of occupancy, means a person entitled to a right of occupancy and includes any person to whom a right of occupancy has been validly assigned or has validly passed on the death of a holder but does not include any person to whom a right of occupancy has been sold or transferred without a valid assignment, nor a mortgagee, sub-lessee or sub-underlessee.”

¹⁸⁴ Section 29 (1) and (2) LUA to the effect that if a right of occupancy is revoked..., the holder and the occupier shall be entitled to compensation for the value at the date of revocation of their unexhausted improvement. - Amodu, N.A., ‘Efficiency of Mortgage transactions under the Land Use Act: Myth or Reality’ <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843241> accessed 6 September, 2014.

¹⁸⁵ *Ogunleye v Oni* (1990) 2 NWLR (Part 135) 733; *Alhaji Goni Kyari v Alhaji Ciroma Alkali & Ors* (2001) 11 NWLR (PT 724) 412. Also highlighted in Emmanuel Ekpeyong ‘The challenges Associated with exercising the power of sale under a mortgage in Nigeria’, (24 April 2014) <http://www.academia.edu/7553472/The_Challenges_Associated_With_Exercising_The_Power_Of_Sale_Under_A_Mortgage_In_Nigeria> accessed 8 January 2015.

¹⁸⁶ In *Sir Adetokunbo Ademola v Amao & Ors* (1982) CGSLR p.273 reported in Omotola J. A. “Cases on the Land Use Act” p. 132 in Amodu, N.A., ‘Efficiency of Mortgage transactions under the Land Use Act: Myth or Reality’ <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843241> accessed 6 September, 2014

presumption of a right of occupancy.¹⁸⁷ Therefore, a revocation based on the fact that the holder had no title to the land puts the mortgagee in a precarious position. The security of the mortgagee becomes an unsecured debt recoverable by action for recovery of debt like any other debt.¹⁸⁸ In *Eriketola v. Alli*¹⁸⁹ a mortgage was set aside where a domestic servant used family property given to him without the consent of the family head/principal members as security for personal loan.

4.3 Judicial Challenges: The Judicial system has been described as slow and porous.¹⁹⁰ For instance, in an action for foreclosure by the mortgagee, courts are more inclined to give several opportunities as possible to the mortgagor to redeem.¹⁹¹ This is aggravated by the fact that foreclosure is enforceable only through the court.

The enforcement time also depends on whether the mortgagor challenges the process or not.¹⁹² The mortgagor may file different preliminary objections to frustrate the mortgagee's attempts at

¹⁸⁷ In *Agboola v U.B.A. Plc* (2011) 11 NWLR (Part 1258) 375 it was stated that a certificate of occupancy regularly issued by competent authority raises the presumption that the holder is the owner in exclusive possession of the land in respect thereof.

¹⁸⁸ <https://www.google.com.ng/search?q=THE+DISTINCTION+BETWEEN+A+MORTGAGE+AND+A+CHARGE.IS+IT+MERELY+IN+NOMENCLATURE%3F&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&channel=fflb&gfe_rd=cr&ei=mf6yVPL0KcjDaJnMgpAP> accessed 7 January 2015.

¹⁸⁹ (1941) 16 NLR 56

¹⁹⁰ LLM Class seminar UNILAG. 'The mortgagee's power of sale- problems and solutions' <http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fsecuredcredit.files.wordpress.com%2F2011%2F02%2Fthe-mortgagee-grp-6seminar-paper.doc&ei=wfiyVPziEoTnUs2Pg4AI&usg=AFQjCNF5p--hEiNSVx3_I28pMi4QeMZFAw&sig2=R1dMhnMStZgG2eCzYhdYkA&bvm=bv.83339334,d.d> accessed 7 January 2015.

¹⁹¹ Osinbajo, Y., 'Challenges of enforcement of Securities in Nigeria' <http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.justiceresearchinstitute.org%2Fassets%2FENFORCEMENT-OF-SECURITIES-CHALLENGES.pptx&ei=hPWYVKKpGcGyUd-AgegM&usg=AFQjCNFpGf3fD4JDWk-vVozFr2MFRM1GoA&sig2=I_8usNhZ6xB6lTCEoZM5xw&bvm=bv.83339334,d.d24> accessed 7 January 2015.

¹⁹² Anyanechi, O., 'Bank finance and regulation. Multi-jurisdictional survey Nigeria. Enforcement of security interests in banking transactions.' <https://www.google.com.ng/search?q=Bank+finance+and+regulation.+Multi-jurisdictional+survey+Nigeria.+enforcement+of+security+interests&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&channel=fflb&gfe_rd=cr&ei=oqCsVK-yOIGA0AW-6YDwCA> accessed 7 January 2015.

enforcement. Adoke¹⁹³ opines that the current complicated procedures in our law courts and the unduly slow pace of proceedings cast a dim pall on the chances of achieving growth in the areas of enforcement of mortgages.

4.4 Social Challenges: Co-ownership of property as subject-matter of security is one of the complications that arise in the enforcement of mortgage security.¹⁹⁴ This is especially challenging where there are inadequate provisions as to the ownership of the property in relation to the mortgage transaction. In such situations, disputes may arise in relation to how the property is to be owned between co-owners; limit on liability to pay the mortgage according to the proportion of ownership, what happens if one co-owner wishes to sell, the price at which a co-owner may purchase the interest of the other owner, who is to pay for ongoing expenses like water rates and repairs, what happens if one party fails to pay their contribution on their mortgage, is one or more of the parties to be entitled to exclusive occupation of the property?¹⁹⁵

Land taken as security may be contaminated or be prone to environmental liability which might reduce the value of the security during enforcement. Also, a lender in possession may be exposed to liability under the environmental legislation. Under Nigerian environmental laws, occupiers of premises are generally liable for environmental breaches.¹⁹⁶ The Federal Government of Nigeria

¹⁹³ Nigerian Attorney General and Minister of Justice in Jibueze, J., 'Adoke, others seek mortgage laws reform The Nation' *The Nation* (25 June 2013) <<http://thenationonlineng.net/new/adoke-others-seek-mortgage-laws-reform/>> accessed 4 January 2015.

¹⁹⁴ Smith, RELAN Vice-President in Jibueze, J., 'Adoke, others seek mortgage laws reform The Nation' *The Nation* (25 June 2013) <<http://thenationonlineng.net/new/adoke-others-seek-mortgage-laws-reform/>> accessed 4 January 2015.

¹⁹⁵ Sonntag F. 'Property co-ownership: the pitfalls.' <http://www.rockwellolivier.com.au/Whats%28news%29/Latestnews/TabId/105/ArtMID/572/ArticleID/2479/Property-co-ownership-the-pitfalls.aspx?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original> accessed 9 February 2015.

¹⁹⁶ Tominiyi Owolabi, Wolemi Esan, Yewande Senbore, Olaniwun Ajayi LP, 'Lending and taking security in Nigeria: Overview.' Law stated as at 1st April 2014. <<http://us.practicallaw.com/4-524-5665?q=&qp=&qo=&qe=>>> accessed 15 February 2015.

has promulgated various laws to safeguard the Nigerian environment.¹⁹⁷ These laws have attendant liability for failure to abide by them¹⁹⁸. Owners of land are responsible under the law for environmental hazards caused by them, there is no exemption for lenders who assume possession of the mortgaged property.¹⁹⁹

4.5 MORTGAGES AND STATUTE OF LIMITATION

The mortgagee can become statute-barred and prevented from recovering the mortgage sum and interest.²⁰⁰ Where the right to recover the mortgage sum is extinguished, the mortgagee cannot exercise any other remedy ordinarily available to him.²⁰¹ The mortgagee has twelve years within which to recover the mortgage sum.²⁰² This period runs from when the right to recover the loan

¹⁹⁷Oghogho Makinde & Temitayo Adeyoke, 'Environmental Law in Nigeria' <<http://www.mondaq.com/x/53804/Energy+Law/Environment+Law+In+Nigeria>> For example, the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007 Act No.25 (NESREA) , Environmental Impact Assessment Act of 1992, Harmful Wastes (Special Criminal Provisions etc.) Act of 1988 (Harmful Wastes Act) with the Federal Ministry of Environment (FME) as the body that administers and enforces environmental laws in Nigeria.

¹⁹⁸ For example, failure to comply with the Environmental Impact Assessment Act is tantamount to committing an offence liable on conviction, in the case of an individual, to a fine or to a term of imprisonment for up to 5 years; fines are also imposed on guilty firms or corporations. By virtue of Section 25 (1) of NESREA ACT, the agency (National environmental standards and Regulations enforcement agency) may make regulations for the purpose of protecting public health and promotion of sound environmental sanitation. (2) a person who violates the provisions of the regulations made pursuant to sub-section 1 shall be guilty of an offence and punished under the penalties imposed in the regulations made pursuant thereto.

¹⁹⁹ Tominiyi Owolabi, Wolemi Esan, Yewande Senbore, Olaniwun Ajayi LP, 'Lending and taking security in Nigeria: Overview.' Law stated as at 1st April 2014. <<http://us.practicallaw.com/4-524-5665?q=&qp=&qo=&qe=>> accessed 15 February 2015.

²⁰⁰ *Chigbu v Tonimas (Nig.) Ltd.* (2006) 9 NWLR (Part 984) 189.

²⁰¹ Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 297.

²⁰² Section 29 of the Limitation Law provides to the effect that where any principal sum of money is secured by a mortgage or charge on land, or on movable property (other than a ship), no action shall be brought to recover such sum after the expiration of twelve years from the date when the right to recover the money accrued.

The limitation period of 12 years only applies to the mortgage sum and not interest. By virtue of section 30 of the Limitation Law (Cap L67, Laws of Lagos State, 2003) the right to recover interest on the mortgage sum becomes statute-barred if the interest is not recovered within six years. Exceptions: where a prior mortgagee or other encumbrancer has been in possession of the mortgaged property and an action is brought within one year of the discontinuance of possession by the mortgagee; then he may recover the arrears of interest on that property that arose during the period of the possession by the previous encumbrancer or damages thereof irrespective of the fact that the period exceeded six years. Also, where the mortgaged property comprises any future interest or life insurance policy and it is a term of the mortgage that arrears of interest shall be treated as part of the principal sum secured by the

accrued. This usually accrues from the date agreed for redemption²⁰³ unless there is subsequent acknowledgement of the debt by the mortgagor or an acknowledgement of the right of the mortgagee in the mortgaged property.²⁰⁴

mortgage, such interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.

²⁰³ Oniekoro, F.J. *Mortgages in Nigeria Law and Practice*, (Enugu: Chenglo Ltd., 2007) 296.

²⁰⁴ Section 41, Limitation Law, CAP. L67, Laws of Lagos State, 2003.

CHAPTER FIVE: SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.0 SUMMARY

This work began with the importance of land to man's existence and the ultimate development of a nation. Land is a reliable form of security in the acquisition of loans for various business projects. Its importance encompasses fostering job creation, eradication of poverty and nation building. Despite this fact, the development of a nation may be hindered where problems arise in the repayment of loans and the adequacy of the security in offsetting same loan.

Related to the above is the description of a mortgage transaction while differentiating it from other similar transactions. The importance of land as the best security has also been highlighted. Mortgage institutions in Nigeria have been enumerated. The types of mortgage (Legal and Equitable) and their modes of creation have been highlighted as this dictates the remedies available to the mortgagee (mortgage institutions) in the enforcement of the mortgage security.

The methods of enforcement of mortgage security in Nigeria have been identified as: action to recover mortgage sum and interest, taking possession of the security, appointing a receiver, sale of the security, foreclosure, and action for order of specific performance. These highlight the fact that the mortgagee has a variety of options at his disposal to ensure ease of realisation at the mortgagor's failure to repay the mortgage debt as at when due. A balance has been created by the identification of the rights of the mortgagor (equity of redemption, equitable right to redeem, injunction against a mortgagee's exercise of the power of sale) as well.

An effective mortgage industry through prompt enforcement of mortgage security is important in the development of Nigeria. However, the fact that these methods of enforcement are not automatic in Nigeria because of the various challenges highlighted (legal, judicial and social) aggravates the

position of the mortgagee. These challenges test the viability of the methods of enforcement available to the mortgagee.

5.1 CONCLUSION

The fact that easy realization of credit is crucial to confidence in lending²⁰⁵ cannot be undermined. The major concern of mortgage institutions is the repayment of the mortgage debt. This could be by the mortgagor simply repaying the mortgage debt or the mortgagee resorting to the security to recover the debt. The ultimate aim is to attain a viable mortgage industry that can favourably compete in the global economy. This can only be achieved where the mortgage institutions are sturdy and there is a balance in the inflow and outflow of funds in the economy. Although there is a variety of remedies available to the mortgagee in the enforcement of the mortgage security in Nigeria, it is evident that these processes are beset with many challenges. Therefore, in order to ensure continuous growth in the Nigerian mortgage industry, improvement and innovation are required in the challenging areas.

²⁰⁵ Osibanjo, Y., 'Challenges of enforcement of Securities in Nigeria' (2010) <http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.justiceresearchinstitute.org%2Fassets%2FENFORCEMENT-OF-SECURITIES-CHALLENGES.pptx&ei=hPWyVKKpGcGyUd-AgegM&usg=AFQjCNFpGf3fD4JDWk-vVozFr2MFRM1GoA&sig2=I_8usNhZ6xB6lTCEoZM5xw&bvm=bv.83339334.d.d24> accessed: 7 January 2015.

5.2 RECOMMENDATIONS²⁰⁶

Based on the challenges involved in the enforcement of mortgage security in Nigeria, the following recommendations are being made:

- **PROCEDURE/PROCESSES**

Improved Statutory reforms: Reform of our laws should be a continuous process. Wilson²⁰⁷ asserts that on average, laws in wealthy countries have been enacted or amended much more recently than those in developing countries, whose laws often date to colonial times. Where reforms are frequent (although not indiscriminate) then it is easier to spot lacunae in the law while linking it to areas that cause distress to the people.

On the revocation of the right of occupancy subject matter of mortgagee's security, the Land Use Act should permit the mortgagee to have an equal right to claim the compensation money unlike the present situation.

Also, before the issuance of the certificate of occupancy, there should be an effective way of verifying the claim to right of occupancy of any individual. This would add to the value and weight of the certificate and probably make it a good root of title.

²⁰⁶Recommendations of the Financial System Strategy towards introducing a new framework to strengthen property/security rights include: Deconstitutionalize the Land Use Act, remove the requirement for governor's consent on land transactions in the Land Use Act, remove the arrangements for foreclosure proceedings on real estate from general common law provisions; establish specialized courts/tribunals that will fix the terms and timing of challenge of foreclosure, commence the automation and eventual integration of all records and processes of local, state and Federal Government land, reduce statutory cost structure of all land transactions. <<http://www.cenbank.org/fss/tue/BSP/Mortgage%20&%20Credit/FSS%202020%20%20Mortgage%20Presentation.pdf>> accessed 9 February 2015.

²⁰⁷ Inam Wilson, 'Enhancing Nigeria's Economic Development: A Case for Institutional and Regulatory Reforms in Nigeria's Banking Sector' (25 April 2005) <<http://www.mondaq.com/x/32173/Insolvency+Bankruptcy/Enhancing+Nigerias+Economic+Development+A+Case+for+Institutional+and+Regulatory+Reforms+in+Nigerias+Banking+Sector>> accessed 9 February 2015.

To avoid the delays linked with the consent giving process, the Land Use Act should specify a duration within which the consent of the Governor is to be given.²⁰⁸ Ananechi²⁰⁹ also claims the existence of the Land Use Bill which is expected to mitigate the cumbersome practice of seeking the Governor's consent for alienation of any interest in land including mortgages. The Act should also address the issue of the Governor withholding consent unreasonably. More practically, it has been advocated that mortgage to Banks and other financial institutions should be exempted from the consent provisions of the Act as was the case under the Acquisition of lands by Aliens Law.²¹⁰

Also, even without strictly complying with the consent provisions, a mortgage should be treated as an equitable mortgage. Although defective mortgages may pose challenges in their enforcement, there are certain viable equitable doctrines which may salvage the situation.²¹¹ A cue may be taken from jurisdictions that have practised these:²¹²

The mortgagee may ask the court to declare the defective mortgage as an equitable mortgage to replace it. In *Taylor Electric v First Mariner Bank*²¹³ while relying on the decision in *Dyson v Simmons*²¹⁴ it was held that once the borrower signed the loan

²⁰⁸ Amodu, N.A., 'Efficiency of Mortgage transactions under the Land Use Act: Myth or Reality' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843241> accessed 6 September, 2014.

²⁰⁹ Anyanechi, O., 'Bank finance and regulation. Multi-jurisdictional survey Nigeria. Enforcement of security interests in banking transactions.' <https://www.google.com.ng/search?q=Bank+finance+and+regulation.+Multi-jurisdictional+survey+Nigeria.+enforcement+of+security+interests&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&channel=fflb&gfe_rd=cr&ei=oqCsVK-yOIGA0AW-6YDwCA> accessed 7 January 2015.

²¹⁰ Olanrewaju, D. 'The fallacy of using power of attorney to avoid the consent provisions under the Land Use Act' *Babcock University Socio-Legal Journal*. Volume 1, Number 2, (August 2012) 176.

²¹¹ Robert A. Scott, Glenn Cline, 'Dealing with defective mortgages' <http://www.ballardspahr.com/~media/files/articles/2011-10-25_dealing_with_defective_mortgages> accessed 28 December 2014.

²¹² To a large extent, the rights of the mortgagee are extended in these jurisdictions. It is suggested that Nigeria takes a hint from these in order to give the mortgagee some form of assurance.

²¹³ 992 A. 2d 490 (Md. Ct. Spec. App. 2010). Also held in *Degirrolamo v Suntrust Mortg. Inc.* No. 10-6032 (Bankr. N.D. Ohio September 2010).

²¹⁴ 48 Md. 207 (1878).

agreement and defective deed of trust, equitable title passed to the bank and the subsequent mechanic's lien did not attach to the property. Thus where an instrument intended to operate as a mortgage fails as a legal mortgage because of some defect in its execution, an equitable mortgage may be recognized, with priority over judgments subsequently obtained.

Equitable subrogation may also be employed. This is to the effect that although defective, an equitable lien (in favour of the lender) may be established by the courts where the proceeds of the loan were used to pay off a pre-existing lien.

The Doctrine of Constructive notice may also be employed to the effect that the holder of a competing lien may be held to have constructive notice of the defective liens. In *3502 Lending, LLC v CTC Real Estate*²¹⁵ the Court of Appeal held that a defective mortgage took priority over a competing mortgage because the facts showed that the competing mortgage had constructive notice of the defective lien.

Lastly, substantial compliance may be employed. In *Ameriquist v. Paramount Mortgage*²¹⁶ P's mortgage was 2 days after A's and he contended that A's mortgage did not comply with statutory requirements hence was defective. Nevertheless, the court ruled that A's mortgage "substantially complied" with the statute. Where these principles are applied in relation to the consent provisions under the Land Use Act, the position of mortgagees will not be completely defeated.

²¹⁵ 229 P. 3d 1016 (Ariz. Ct. App. 2010).

²¹⁶ 4 A. 3d 934 (Md. 2010).

Accelerated Court Processes: Adoke²¹⁷opined that ease and clarity in the process of enforcing mortgages, particularly the foreclosure process, are significant catalysts for achieving Nigeria's housing targets. He highlighted the fact that some options have been canvassed as having specialized property courts and the de-mutualisation of mortgages in order to facilitate non-judicial foreclosure.

The reduction of court involvement in business matters by permitting private enforcement of collateral with recourse to the courts only for disputes will greatly reduce enforcement time and encourages lending.²¹⁸ The introduction of summary procedures for commercial disputes greatly reduces litigation time.

- **ENFORCEMENT**

Clear and Precise Co-ownership Agreements: In relation to the challenge of enforcement of mortgage over mortgage property that is subject to co-ownership. If the mortgage is over part only of an area of land, it should make provision so that, on a disposal on enforcement, appropriate rights are taken over or reserved against the land beyond the mortgage.²¹⁹ Parties intending to enter into co-ownership arrangements should agree how they intend to deal with the various situations that may arise and record their intentions and agreement in writing and this should be signed by all parties. The lender may also require all owners to

²¹⁷ Mohammed Adoke (SAN), Minister of Justice at Real Estate Lawyers Association of Nigeria 2013 Summit in Jibueze, J., 'Adoke, others seek mortgage laws reform *The Nation*' *The Nation* (25 June 2013) <<http://thenationonline.net/new/adoke-others-seek-mortgage-laws-reform/>> accessed 4 January 2015.

²¹⁸ Inam Wilson, 'Enhancing Nigeria's Economic Development: A Case for Institutional and Regulatory Reforms in Nigeria's Banking Sector' (25 April 2005) <<http://www.mondaq.com/x/32173/Insolvency+Bankruptcy/Enhancing+Nigerias+Economic+Development+A+Case+for+Institutional+and+Regulatory+Reforms+in+Nigerias+Banking+Sector>> accessed 9 February 2015.

²¹⁹Field Fisher Waterhouse 'Security over land' (June 2011) <<http://www.fieldfisher.com/media/2457/Security-over-land.pdf>> accessed 28 December 2014.

enter into an agreement with the lender to give reassurance to the lender that the mortgage security may be enforced in the event of any default by any or all of the owners.²²⁰

Frivolous Litigation: To prevent frivolous actions of injunctions by the mortgagor to frustrate the mortgagee, courts should be active in the enforcement of the mortgage security.²²¹ Such vexatious litigation can be curbed by sanctions on the mortgagor where discovered.²²² Also, in order to circumvent allegations of fraud and its attendant litigation, the mortgagee should ensure that the mortgage sale is carried out in good faith.

Establishment of an efficient foreclosure system: An efficient foreclosure system will give more guarantee to lenders in cases of default. At the moment foreclosure of a mortgage can only be by order of court. In response to this, the establishment of specialised property courts will ensure that less time is expended in the exercise of this remedy. Although Ananechi has stated the existence of a foreclosure bill expected to set out foreclosure rights and procedure without recourse to the courts.²²³ Improved procedures are being considered through adoption of new legislations such as the proposed Mortgage and Foreclosure Law.

²²⁰ Sonntag F. 'Property co-ownership: the pitfalls.' <http://www.rockwellolivier.com.au/Whats%28news%29/Latestnews/TabId/105/ArtMID/572/ArticleID/2479/Property-co-ownership-the-pitfalls.aspx?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original> accessed 9 February 2015.

²²¹ Agbo, J.C.A in *Abdulrahman v. Oduneye* (2009) 17 NWLR (Part 1170) 237 on the importance of enforcement of mortgage transactions stated thus: 'I am aware of the housing crisis in the country today and we need the finance institutions to avail the public with finance for both housing and other major business transactions. This financing is mainly secured by mortgage transactions. If for every flimsy excuse the courts avoid the execution of mortgaged deeds, the financial institutions will be reluctant to extend credit to the public and the overall economy will be the loser.'

²²² For example, section 25 and 26 of the Mortgage and Property Law (2010) of Lagos state penalises a party who deliberately delays the expeditious hearing of matters coming under the law and mandates a mortgagor to deposit the debt sum into the court before obtaining any injunctive relief from the court respectively.

²²³ Anyanechi, O., 'Bank finance and regulation. Multi-jurisdictional survey Nigeria. Enforcement of security interests in banking transactions.' <https://www.google.com.ng/search?q=Bank+finance+and+regulation.+Multi-jurisdictional+survey+Nigeria.+enforcement+of+security+interests&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&channel=fflb&gfe_rd=cr&ei=oqCsVK-yOIGA0AW-6YDwCA> accessed 7 January 2015

This seeks to usher in a regime to hasten the procedures and to make mortgage enforcement more effective.²²⁴

Furthermore, in line with the provisions of the 2011 National Housing Policy allowing state government to formulate its own housing policy and programs within the overall framework and in the spirit of the National Housing Policy,²²⁵ the Lagos State has introduced the Mortgage and Property Law 2010.²²⁶ The objective of this law on realization of securities is in line with the development of foreclosure laws envisaged in the National Housing Policy document.²²⁷

- **REALISATION**

Environmental Risk Assessment: Lenders should seek to establish that land taken as security is free of any contamination or other environmental liability which might reduce the value of the security. Early detection through environmental risk assessment, environmental survey would greatly ameliorate such situations.

**** The role of the Asset Management Corporation of Nigeria (AMCON) in the recovery of bad loans has helped to sustain banks on the brink of collapse. Established pursuant to the AMCON Act No. 4 2010, AMCON was created to be a key stabilising and revitalising tool established to revive the financial system by efficiently resolving the non-performing loan assets of the banks in**

²²⁴ El-Shaddai Ikeh, 'Assessing the Constraints to Financing the Real Estate Sector in Nigeria' <<http://greymile.wordpress.com/tag/nmrc/>> accessed 3 January 2015.

²²⁵ Akintunde Otubu, 'National Housing Policy and the Mortgage and Property Law of Lagos state 2010.' <http://www.academia.edu/9697220/NATIONAL_HOUSING_POLICY_AND_THE_MORTGAGE_AND_PROPE
[RTY_LAW_LAGOS_STATE_2010](http://www.academia.edu/9697220/NATIONAL_HOUSING_POLICY_AND_THE_MORTGAGE_AND_PROPE)> accessed 3 January 2015.

²²⁶ Lagos State of Nigeria Official Gazette No. 32 Vol. 45 of 15th August 2012.

²²⁷ Akintunde Otubu, 'National Housing Policy and the mortgage and property law Lagos state 2010' <http://www.academia.edu/9697220/NATIONAL_HOUSING_POLICY_AND_THE_MORTGAGE_AND_PROPE
[RTY_LAW_LAGOS_STATE_2010](http://www.academia.edu/9697220/NATIONAL_HOUSING_POLICY_AND_THE_MORTGAGE_AND_PROPE)> accessed 3 January 2015.

the Nigerian economy.²²⁸ To this effect AMCON acquires eligible assets²²⁹ from Eligible Financial Institutions at a fair value. This helps the eligible financial institutions to free up resources for more profitable activities to improve their capital position.²³⁰

²²⁸ <amcon.com.ng> accessed 18 March 2015.

²²⁹ Section 24 AMCON Act to the effect that the Central Bank of Nigeria may designate through guidelines any class of bank assets as eligible bank assets.

²³⁰ <amcon.com.ng> accessed 18 March 2015.

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[a&channel=fflb&gfe_rd=cr&ei=mf6yVPL0KcjDaJnMgpAP](https://www.google.com.ng/search?q=THE+DISTINCTION+BETWEEN+A+MORTGAGE+AND+A+CHARGE.IS+IT+MERELY+IN+NOMENCLATURE%3F&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&channel=fflb&gfe_rd=cr&ei=mf6yVPL0KcjDaJnMgpAP)>

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<www.cenbank.org/Supervision/Inst-PMI.asp?NAV=1> accessed 26 December 2014.

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